No. 4358

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Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of SUN DRUG COMPANY, Bankrupt.

R. L. SABIN, as Trustee in Bankruptcy of the SUN DRUG COMPANY,

Petitioner,

vs.

ACME INVESTMENT COMPANY, a Corporation,

Respondent.

Petition for Revision

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the District of Oregon.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of SUN DRUG COMPANY, Bankrupt.

R. L. SABIN, Trustee in Bankruptcy of the SUN DRUG COMPANY,

Petitioner,

vs.

ACME INVESTMENT COMPANY, an Oregon Corporation,

Respondent.

PETITION OF TRUSTEE TO REVIEW UNDER SECTION 24–B.

To the Honorable Judges of the Circuit Court of Appeals for the Ninth Circuit:

Your petitioner, R. L. Sabin, Trustee in Bankruptcy of the Sun Drug Company, Bankrupt, hereby represents as follows:

I.

That on or about the 23d day of September, 1923, the Sun Drug Company, an Oregon corporation, filed its voluntary petition and schedules in bankruptcy in the District Court of the United States for the District of Oregon, and thereafter on said date was duly adjudged a bankrupt, and a reference of said matter was thereupon made to Honorable A. M. Cannon, Referee in Bankruptcy of said court, and your petitioner was thereafter elected trustee and has duly qualified by giving the required bond, which

bond has been accepted and approved, and that your petitioner is the duly qualified, regularly appointed and acting Trustee in Bankruptcy of said Sun Drug Company, bankrupt, and that prior to his qualifications as Trustee he was the duly qualified, regularly appointed and acting Receiver of said bankrupt.

II.

That as such Receiver and as such Trustee of said bankrupt corporation he held the property of the bankrupt in the premises at No. 351 Washington Street, Portland, Oregon, where said bankrupt conducted its business, which premises were the subject of a lease hereinafter referred to between the said Acme Investment Company, respondent herein, and the Sun Drug Company.

III.

That on the 4th day of November, 1923, the Acme Investment Company filed a petition in said estate praying that the Referee in Bankruptcy order and direct the Trustee to pay to it the sum of $977.60, rental of the premises during the time said Receiver and Trustee occupied said premises.

IV.

That thereupon the Trustee in Bankruptcy herein filed his objection to the said petition of the Acme Investment Company on the ground and for the reason that the Trustee in Bankruptcy, by virtue of his trusteeship of said bankrupt, had a claim against the Acme Investment Company for the sum of $5,000.00 in cash and for a note of $1,600.00 and that therefore the Acme Investment Company owed

to the Trustee a sum greater than the Trustee owed to it.

V.

That said claim of $5,000.00 in cash and $1,600.00 in a note arose by reason of the fact that the Sun Drug Company, on or about the 15th day of February, 1923, upon entering into a lease of the premises, which it occupied, with the Acme Investment Company, paid to and deposited with the Acme Investment Company the sum of $5,000.00 in cash and turned over and gave to it a note in the amount of $1,600.00 in fact and in truth as security for the faithful performance of the covenants of said lease, although in said lease said sum of $5,000.00 in cash and the promissory note of the Sun Drug Company in favor of the Acme Investmennt Company in the sum of $1,600.00 were stated to be the consideration whereby the Lessor, Acme Investment Company, leased said premises to the Sun Drug Company, and that thereafter, on the 28th day of July, 1923, and prior to the bankruptcy of said Sun Drug Company the said Acme Investment Company canceled said lease by a writing directed to and delivered to the said Sun Drug Company, and that by reason of said premises the Acme Investment Company held the said sum of $5,000.00 in cash and said note of $1,600.00 of said Sun Drug Company and upon cancellation of said lease at its own volition the said Acme Investment Company was under obligation to deliver back to the Sun Drug Company said sum of $5,000.00 and said note, and upon its failure so to do, became obligated, upon the bankruptcy of

said Sun Drug Company and the election of your petitioner as Trustee, to said Trustee in said sum of $5,000.00 and said note.

VI.

That thereafter a hearing was had upon the objection of the Trustee to said petition of the Acme Investment Company, but not upon the merits of the claim for the rental value of said premises during the time the same was occupied by the Receiver and the Trustee herein.

VII.

That after said hearing said matter was taken under advisement by the Referee and after due consideration thereof the said Referee in Bankruptcy on the 14th day of July, 1924, made an order denying said petition and disallowing said claim for rent on the ground and for the reason that said money and note held by the said Acme Investment Company was held as security for the faithful performance of the covenants of said lease and upon the cancellation thereof by the said Acme Investment Company the said moneys and note were held for and on behalf of the Sun Drug Company and after it became bankrupt for and on behalf of said Trustee in Bankruptcy of Sun Drug Company.

VIII.

That thereafter, on the 18th day of July, 1924, the said Acme Investment Company, feeling aggrieved by said order, filed a petition to review said Referee's order.

IX.

That thereafter, on the 29th day of September,

1924, the District Court of the United States for the District of Oregon made an order reversing the said Referee and directing that the Trustee pay the claim of said Acme Investment Company for rent.

X.

All of the foregoing matters will be made to appear more fully to your Honors by a transcript of the record which will be transmitted to this court.

XI.

That said order of the District Court of the United States for the District of Oregon was and is erroneous as a matter of law in that:

(1) Said District Court of the United States for the District of Oregon reversed the said Referee.

(2) The District Court of the United States for the District of Oregon failed to confirm the order of said Referee.

(3) The District Court of the United States for the District of Oregon ordered the Trustee to pay the claim for rent of the premises occupied by the Receiver and Trustee during the period of administration, notwithstanding the fact that no hearing had been had upon the merits of said claim.

WHEREFORE, your petitioner, feeling aggrieved because of said order, asks that the same be revised as provided in Section 24–B of the Bankruptcy Act and the Rules and Practices in such cases made and provided, and that the same be reversed and an order made disallowing the prayer of the petition of said Acme Investment Company, respondent herein, and for such other and further relief as may be just and proper.

Dated at Portland, Oregon, this 7th day of October, 1924.

R. L. SABIN,
Petitioner.

SIDNEY TEISER,
Attorney for Petitioner.

United States of America,
District of Oregon,
County of Multnomah,—ss.

I, R. L. Sabin, being first duly sworn, on oath depose and say that I am the Trustee in Bankruptcy named in the foregoing petition and that the facts set forth therein are true as I verily believe.

R. L. SABIN.

Subscribed and sworn to before me this 7th day of October, 1924.

[Seal] SIDNEY TEISER,
Notary Public for Oregon.

My commission expires Dec. 27, 1924.

United States of America,
State of Oregon,
County of Multnomah.

Due service of the within Petition to Review is hereby accepted in Multnomah County, Oregon, by receiving a copy thereof duly certified.

BRICE & BRAZELL,
Attorneys for Acme Investment Company, Respondent.

Oct. 9, 1924.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of

Sun Drug Company, Bankrupt. R. L. Sabin, Trustee in Bankruptcy of the Sun Drug Company, Petitioner, vs. Acme Investment Company, an Oregon Corporation, Respondent. Petition of Trustee to Review Under Section 24–B.

In the United States Circuit Court of Appeals for the Ninth Circuit.

In the Matter of SUN DRUG COMPANY, Bankrupt.

R. L. SABIN, Trustee in Bankruptcy of the SUN DRUG COMPANY,

Petitioner,

vs.

ACME INVESTMENT COMPANY, an Oregon Corporation,

Respondent.

NOTICE OF FILING PETITION FOR REVIEW.

To Acme Investment Company and to Brice & Brazell, Its Attorneys:

You, and each of you, are hereby notified that on the 14th day of October, 1924, at the hour of ten o'clock in the forenoon of said day, we will file in the office of the Clerk of the Circuit Court of Appeals for the Ninth Circuit, in the City of San Francisco, California, a Petition for Review in the above-entitled cause, a copy of which petition is hereto annexed as a part of this notice.

Dated at Portland, Oregon, this 7th day of October, 1924.

SIDNEY TEISER,
Attorney for Trustee in Bankruptcy.

United States of America,
State of Oregon,
County of Multnomah.

Due service of the within notice is hereby accepted in Multnomah County, Oregon, by receiving a copy thereof duly certified.

BRICE & BRAZELL,
Attorneys for Acme Investment Company, Respondent.

Oct. 9, 1924.

[Endorsed]: In the United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Sun Drug Company, Bankrupt. R. L. Sabin, Trustee in Bankruptcy of the Sun Drug Company, Petitioner, vs. Acme Investment Company, an Oregon Corporation, Respondent. Notice of Filing Petition for Review.

[Endorsed]: No. 4358. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Sun Drug Company, Bankrupt. R. L. Sabin, as Trustee in Bankruptcy of the Sun Drug Company, Petitioner, vs. Acme Investment Company, a Corporation, Respondent. Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in

Matter of Law, an Order of the United States District Court for the District of Oregon.

Filed October 13, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 4358

United States

Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of SUN DRUG COMPANY, Bankrupt.

R. L. SABIN, as Trustee in Bankruptcy of the SUN DRUG COMPANY,

Petitioner,

vs.

ACME INVESTMENT COMPANY, a Corporation,

Respondent.

TRANSCRIPT OF RECORD IN SUPPORT OF PETITION FOR REVISION

Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the District of Oregon.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

SIDNEY TEISER, Morgan Building, Portland, Oregon,

For the Trustee of the Estate of the Above-named Bankrupt.

BRICE and BRAZELL, Yeon Building, Portland, Oregon,

For Acme Investment Company.

In the District Court of the United States for the District of Oregon.

July Term, 1924.

BE IT REMEMBERED, that on the 14th day of August, 1924, there was duly filed in the District Court of the United States for the District of Oregon, a certificate of the Referee in Bankruptcy for review of an order of the said Referee, in words and figures as follows, to wit: [1*]

*Page-number appearing at foot of page of original certified Transcript of Record in Support of Petition for Revision.

In the District Court of the United States for the District of Oregon.

No. 7234.

In the Matter of SUN DRUG COMPANY, Bankrupt.

CERTIFICATE ON PETITION TO REVIEW ORDER DISALLOWING CLAIM OF ACME INVESTMENT CO.

The undersigned Referee in Bankruptcy hereby certifies that an order was made July 14th, 1924, denying petition or claim of Acme Investment Company for rent of its premises, occupied by the trustee during the period in which the trustee was engaged in disposing of the stock of merchandise belonging to the bankrupt. Said petitioner, Acme Investment Company, conceiving itself to be aggrieved by the making of said order, filed its petition for review, which was allowed, and the question for decision is the legality of the order made.

Inasmuch as the findings and conclusions of the undersigned are fully set forth in the order itself, which accompanies this certificate, it is not deemed necessary to restate them here. I hand up herewith as the record, petition for review, the order under review, and exhibits filed, being a certain notice to quit, and the lease under consideration.

Respectfully submitted under date of August 13, 1924.

A. M. CANNON,
Referee in Bankruptcy.

Notice of the filing of the foregoing certificate on review mailed to Brice & Brazell, Yeon Building, and to Sidney Teiser, Morgan Building, on this 14th day of August, 1924.

G. H. MARSH,
Clerk.

Filed August 14, 1924. G. H. Marsh, Clerk. [2]

AND AFTERWARDS, to wit, on the 18th day of July, 1924, there was duly filed with the Referee in Bankruptcy, and on August 14, 1924, there was duly filed in said court, attached to the foregoing certificate, a petition for review of the order of the Referee in Bankruptcy, in words and figures as follows, to wit: [3]

In the District Court of the United States for the District of Oregon.

In the Matter of SUN DRUG COMPANY, Bankrupt.

PETITION TO REVIEW REFEREE'S ORDER.

To the Honorable A. M. CANNON, Referee in Bankruptcy:

Acme Investment Company, an Oregon corporation, respectfully files this, its petition and shows:

That prior to February 1st, 1923, Acme Investment Co. leased to the above-named bankrupt the premises at 351 Washington Street, Portland, Oregon, for a ten year period beginning February 1st, 1923, at a monthly rental of $1,045.00 for the first

five years and $1,195.00 for the last five years of the term.

That thereafter and on September 23d, 1923, Sun Drug Co., lessee as aforesaid, filed a voluntary petition in bankruptcy and was adjudicated a bankrupt.

Thereafter your petitioner, Acme Investment Co., filed a claim in the sum of $977.60 with and against the Trustee of Sun Drug Co., a corporation, Bankrupt, for rent accruing during the time the Receiver and Trustee were in possession of the premises.

That thereafter and on July 14, 1924, Referee in Bankruptcy made an order denying said petition and disallowing said claim for rent, a copy of which order is hereto annexed. That said order was made and entered herein on July 14th, 1924.

That such order was and is erroneous in that the petition of Acme Investment Co. should have been granted and its claim for rent in the sum of $977.60 should have been allowed.

WHEREFORE, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed as provided in the Bankruptcy Act of 1898 and General Order No. XXVII.

Dated at Portland, Oregon, July ——, 1924.

ACME INVESTMENT CO.
By G. CELSI,
President. [3½]

State of Oregon,
County of Multnomah,—ss.

I, Geo. Celsi, being first duly sworn, on oath depose and say:

That I am president of Acme Investment Co., a

corporation, the petitioner named in the foregoing petition, that I have read the foregoing petition and that the same is true and correct.

G. CELSI.

Subscribed and sworn to before me this —— day of July, 1924.

[Seal] EDWARD J. BRAZELL,
Notary Public for Oregon.

My commission expires September 6, 1924.

State of Oregon,
County of Multnomah,—ss.

Due service of the within petition to review Referee's order, together with a copy thereof duly certified to be such by Edward J. Brazell, one of petitioner's attorneys, is hereby admitted at Portland, Oregon, this 18th day of July, 1924.

SIDNEY TEISER,
Attorney for Trustee in Bankruptcy of Sun Drug Co.

Filed July 18, 1924. A. M. Cannon, Referee in Bankruptcy.

Filed August 14th, 1924. G. H. Marsh, Clerk. [4]

AND, to wit, on the 14th day of July, 1924, there was duly filed with the Referee in Bankruptcy, and on August 14, 1924, there was duly filed in said court, the decision and order of the Referee in Bankruptcy, in words and figures as follows, to wit: [5]

In the District Court of the United States for the District of Oregon.

In the Matter of SUN DRUG COMPANY, Bankrupt.

DECISION AND ORDER UPON PETITION OF ACME INVESTMENT COMPANY.

There is an objection by the trustee to the petition of the Acme Investment Company for rent during the time the trustee was in possession of the premises in the course of administration. The agreed facts in the dispute are that a few months before this failure a real estate agent procured the Sun Drug Company as a tenant for the Acme Investment Company at a total rental of $141,000 over a ten-year period which would be at the rate of $1,180 per month. Before the lease was signed it was agreed that said total rent of $141,000 should be so distributed as that $6,600 should be deducted or paid at the signing of the lease and that the balance of $134,400 should be paid during the term at the rate of $1,045 for the first five years and $1,195 for the last five years, thus completing the total contract of $141,000. It was conceded at the hearing that the purpose of the parties in thus disposing of the consideration was to secure to the lessor the faithful performance of the lease by the Sun Drug Company.

The lease itself, after the formal parts, covers the subject in this language:

"Now therefore, in consideration of the sum of Five Thousand ($5,000.00) Dollars in cash and the promissory note of the Lessee in favor of the Lessor due April 15th, 1923, in the sum of Sixteen Hundred ($1,600.00) Dollars, the receipt of said cash and note being hereby acknowledged by the Lessor, and in further consideration of the rentals herein reserved, and of the covenants herein contained on the part of the Lessee, to be paid and to be kept and faithfully performed by it, said Lessor does hereby lease, demise," etc.

Prior to the filing of the petition in bankruptcy, as shown by the exhibits in the case, the Acme Investment Company cancelled this lease and notified the tenant to quit. And the question therefore is, is the landlord entitled to retain the $5,000 cash paid under the aforesaid circumstances plus the [6] monthly rentals it received or is the trustee entitled to receive the $5,000 back from the landlord?

I think the true rule is that the intention of the parties should and must govern and that this intention as gathered from all these circumstances, was to the effect that the $5,000 in cash received at the date the lease was signed was a part of the total lease contract paid in advance as a deposit to secure to the landlord the faithful performance of the lease. This is certainly so if it is permissible to inquire into the real purpose of the parties in coming to such an agreement and making and receiving this payment. As to this I think it requires no citation of authorities to justify the conclusion

that the true consideration may always be inquired into; that it always may be shown there was no consideration at all for the making of a contract or that the consideration was actually more or less than that stated; and especially is this so where the controversy is confined to the original parties to the contract. Hence, in this case, if the $5,000 was not actually paid as a consideration for the making of the lease, but was paid as rent in advance, I think that fact may be shown and considered by the court notwithstanding the express language of the lease. This seems to be the rule recognized by the Supreme Court of the State of Oregon; Alvor vs. Banfield, 85 Oregon, 49; Moumal vs. Parkhurst, 89 Oregon, 248; Yuen Suey vs. Fleishman, 65 Oregon, 606.

In my opinion the $5,000 paid as related was a mere deposit for security; title to the same did not pass from lessor to lessee, and to permit its retention now would be to allow the enforcement of a penalty for breach of the contract. It was paid by agreement as rent in advance to secure faithful performance and was not given in consideration of the granting of the lease itself. Hence for the landlord to retain it and at the same time annul the lease constitutes a forfeiture or penalty. [7]

The effect of the rule in Alvord vs. Banfield, *supra,* is that the Court will look to the real intention of the parties to determine whether there has been a deposit for the faithful performance of the lease even though the language of the lease itself tends to indicate the contrary and, if it is

found that there was such deposit, the retention of the money secured under such circumstances will be regarded as a penalty or forfeiture and upon termination of the lease by the landlord he must pay back the money deposited.

> "As a general rule the intention of the contracting parties is an important, if not a conclusive element in determining whether a sum stipulated to be paid in case of the breach of the contract is to be regarded as liquidated damages or a penalty. Modern authorities attach greater importance to the meaning and intention of the parties than to the language of the clause designating the sum as a penalty or as liquidated damages: Salem vs. Anson, 40 Or. 339 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169); Wilhelm vs. Eaves, 21 Ord. 194 (27 Pac. 1053, 14 L. R. A. 297). The tendency and preference of the law is to regard the stipulation or covenant as of the nature of a penalty rather than as liquidated damages for the reason that then it may be apportioned to the actual loss sustained and compensation for such loss is the full measure of right and justice. Where the circumstances and the nature of the stipulation are such that the actual damages are not ascertainable with any degree of certainty the rule stated does not apply. If there is an agreement for a fixed, unvarying sum, without regard to the date of the breach, when in the very nature of things the date of the breach would be all important

in determining the element of actual damages, the stipulation must be held to be one for a penalty; 8 R. C. L., sec. 114, p. 564; note, Ann. Cas. 1912C, p. 1025. In Section 115 of 8 R. C. L., p. 567, the author states:

"'In other words, the damages stipulated for must be such as to amount to compensation only, and if the principle of compensation has been lost sight of the sum named will be treated as a penalty.'"

The case of Dutton vs. Christie, 115 Pac. 856, and other cases of same tenor, are relied upon to justify claimant's position, but the report of none of the cases cited show circumstances like those here. In none of them was there a claim and admission, as here, that the payment was integral part of the whole sum to be paid as rent during the occupancy of the premises, and this sufficiently distinguishes this case from those. There is no claim here that the lessee erected this [8] building at the instance of the lessor or was induced to do so by the promise of this payment or that it has suffered any disadvantages or losses. Hence it seems to me that a court should hesitate long before permitting the retention of so large a sum for no consideration at all, unless clearly obliged to do so by the strict terms of their contract. For an occupancy of less than five months the landlord in this case has received more than $10,000, or twice what was agreed when they sat down to make their contract. That construction of the contract which

will relieve the lessee of such a penalty ought to be adopted.

The petition is disallowed.

Dated at Portland, Oregon, July 14, 1924.

A. M. CANNON,
Referee in Bankruptcy.

Filed July 14, 1924. A. M. Cannon, Referee in Bankruptcy.

Filed August 14, 1924. G. H. Marsh, Clerk. [9]

AND AFTERWARDS, to wit, on the 14th day of August, 1924, there was duly filed in said court, attached to the foregoing certificate, a certain notice, in words and figures as follows, to wit: [10]

NOTICE.

July 28th, 1923.

Sun Drug Company,
Portland, Oregon.

Gentlemen:

You are hereby notified that you have violated the terms and conditions in that certain lease dated the 15th day of February, 1923, wherein you agreed to pay certain rents on the premises known as Lot 2, Block 1, Park Block, City of Portland, and by reason of the broken conditions and terms thereof, you are hereby notified that the said lease under which you are holding is hereby cancelled; you are therefore notified to deliver up the premises on or before the first day of August, 1923.

Dated this 28th day of July, 1923.

ACME INVESTMENT CO.

By G. CELSI, Pres.

Filed August 14 1924. G. H. Marsh, Clerk. [11]

AND AFTERWARDS, to wit, on the 14th day of August, 1924, there was duly filed in said court attached to the foregoing certificate a lease, in words and figures as follows, to wit: [12]

LEASE.

THIS INDENTURE, made this —— day of February, 1923, by and between ACME INVESTMENT CO., a corporation, of Portland, Oregon, hereinafter called the lessor, and SUN DRUG CO., a corporation, of Portland, Oregon, hereinafter called the Lessee, WITNESSETH—

WHEREAS, the Lessor is now constructing a two-story building on,—

Lot Two (2), Block One (1), Park Block, in the City of Portland, Oregon,

being a piece of ground fifty (50) feet by One Hundred (100) feet in size, fronting fifty (50) feet on Washington Street and one hundred (100) feet on Park Street. And,—

WHEREAS the Lessee desires to rent from the Lessor the corner store of said premises, said store having a width of approximately seventeen (17) feet on Washington Street and a depth of about fifty-five (55) feet on Park Street, and being known

as number 361, Washington Street, Portland, Oregon. And,—

WHEREAS, the Lessor has agreed to rent such store upon the terms, covenants, and conditions hereinafter mentioned.

NOW, THEREFORE, in consideration of the sum of Five Thousand ($5,0000.00) Dollars in cash and the promissory note of the Lessee in favor of Lessor due April 15th, 1923, in the sum of Sixteen Hundred ($1600.00) dollars, the receipt of said cash and note being hereby acknowledged by the Lessor, and in further consideration of the rentals herein reserved, and of the covenants herein contained on the part of the Lessee to be paid and to be kept and faithfully performed by it, said Lessor does hereby lease, demise, "etc. and let unto said Lessee that certain store known as number [13] 361 Washington Street, in the City of Portland, Oregon, being a space approximately seventeen (17) feet in width on Washington Street and fifty-five (55) feet in depth on Park Street.

TO HAVE AND TO HOLD the said premises hereby demised unto the said Lessee for the full term of ten (10) years beginning March 1st, 1923, and ending February 28th, 1923, said Lessee paying and yielding as rental therefor the full sum of One Hundred Thirty-four Thousand Four Hundred ($134,400.00) Dollars, payable in Gold Coin of the United States of the present standard weight and fineness as follows: The advance monthly rental on One Thousand Forty-five ($1,045.00) Dollars during the first five (5) years of this lease and the

advance monthly rental of One Thousand One Hundred Ninety-five ($1,195.00) Dollars per month during the last five (5) years of this lease, the first month's rent to be paid on March 1st, 1923, and thereafter each month's rent to be paid in advance on the first day of each and every month during said term.

Said Lessee in consideration of the leasing of said premises and the agreements herein contained does hereby expressly covenant to and with the Lessor, its successors and assigns as follows:

I. That said Lessee will pay the said Lessor said specified rentals for the full term of this lease monthly in advance in the manner aforesaid.

II. That the Lessee will make no unlawful, improper, or offensive use of said premises, and will at the expiration of said term, or upon any sooner determination thereof, without notice, quit and deliver up said premises and all future erections or additions to or upon the same, to the said Lessor, or those having its estate [14] in the premises, peaceably, quietly, in as good order and condition (reasonable use and wearing thereof, fire and other unavoidable casualties excepted) as the same shall be when completed or may hereafter be placed by the Lessor.

III. That the said Lessee will not suffer nor commit any strip or waste of the premises, or make or permit any alterations, changes or additions in or to said premises without first obtaining the written permission of the Lessor; that said Lessee will, at its own expense, pay for all alterations,

changes, or additions that may be made as aforesaid; that it will keep and maintain said premises in good condition and repair at its own expense, making the same at all times to comply with the city ordinances of the City of Portland, or other regulations thereof as they may now or hereafter exist.

IV. That the said Lessee will not assign, transfer, mortgage, pledge, hypothecate, sublet, or otherwise encumber or dispose of this lease, or the estate hereby created in the lessee, or any interest in any portion of the same, nor permit any other person or persons to occupy the same, without the written consent of the Lessor being first obtained in writing.

V. That this lease is personal to the Lessee, and its interest therein, or any part thereof, cannot be sold, assigned, transferred, encumbered, seized, or taken by operation of law, or for, under, or by virtue of an execution, or other process or attachment or proceedings instituted against the Lessee, or under or by virtue of any bankruptcy or insolvency proceedings had in regard to the Lessee, or in any other manner.

VI. That the said Lessee will indemnify and save harmless the said Lessor against any loss or damage for [15] injury to persons or property caused by the use or occupancy of said premises by said Lessee, and that said Lessee will keep said premises, and every part thereof, free and clear of all liens for labor and material of any kind during the term hereof.

VII. That the Lessee will keep the plumbing, wiring, and water pipes in good condition and repair and the sidewalks in front of said premises clear of ice and snow; and that said Lessee will also pay for all light, heat, and hot water; it being understood that the Lessor is to furnish cold water and nothing else.

VIII. That the said Lessee will, at all reasonable times, permit and allow said Lessor, and those representing it or having its estate in the premises, to enter into and upon the same, or any part thereof, and examine the condition thereof.

IX. The said Lessee will, during the term of this lease, use and occupy said leased premises only for the following purposes, to wit: to manufacture, purchase, and sell drugs, apothecaries, general drug-store merchandise, and tobaccos, and to conduct a soda fountain business.

X. That said Lessee will carry plate-glass insurance in a sufficient sum to fully protect all the plate glass in the windows of said premises, loss in any, under said policies to be made payable to said Lessor to guarantee the repair or replacement of the same, the policies of said insurance to be delivered to the Lessor.

XI. That in the event any action, suit or proceeding being brought to collect the rent due, or to become due hereunder, or any portion thereof, or to gain possession of said premises, or to enforce compliance with any of the covenants of this lease, or for failure to observe any of the [16] covenants of this lease, said Lessee will pay to the Lessor

such sum as the Court may adjudge reasonable as attorney fees to be allowed in such suit, action or proceeding.

XII. That in case said store, or any part thereof, shall at any time be destroyed or so damaged by fire as to be unfit for occupancy and use the rent shall abate according to the nature and extent of the damage sustained, until said premises shall have been rebuilt or reinstated and made fit for occupancy and use, such repairs to be made by the Lessor.

XIII. It is covenanted and agreed that the Lessee will not suffer or permit any name or other advertising sign or device to be placed, installed, or exhibited on the exterior of the leased premises without first submitting the same to the Lessor and obtaining its approval thereof.

XIV. In the event Lessee should hold over and remain in possession of said premises after the expiration of this lease, without any written lease being actually made, such holding over shall not be deemed to operate as a renewal or extension of this lease, but shall only create a tenancy from month to month, which may be terminated at any time by the Lessor.

That Lessor hereby agrees that during the terms of this lease it will not permit any other person or tenant to conduct a drug store in any part of the building of which the leased premises are a part.

It is understood that the Lessor has leased all of Lot Two (2), Block One (1), Park Block, in the City of Portland, Oregon, from August Berg

under lease dated December 1st, 1922, and that the Lessee derives no greater right [17] hereunder than the Lessor does under and by virtue of said lease from August Berg, reference to which is hereby expressly had, and it is further understood that the Lessee's rights hereunder are subject to the rights of August Berg, Lessor, in the said lease hereinbefore mentioned.

PROVIDED ALWAYS, and these presents are upon this condition that if the Lessee shall be in arrears in the payment of rent for the period of five days, or if said Lessee shall fail to neglect to do or perform or observe any of the covenants contained herein, on its part to be kept and performed, or if said Lessee shall be declared bankrupt or insolvent according to law, or if any assignment of its property shal be made for the benefit of creditors, then and in either of said cases or events, the Lessor, or those having its estate in the premises, lawfully may, at his or their option, immediately or at any time thereafter, without demand or notice, enter into and upon said premises, or any part thereof, in the name of the whole, and repossess the same as of his or their former estate, and expel said Lessee and those claiming by, through or under it, and remove its effects (forcible, if necessary), without being taken or deemed guilty of trespass, and without prejudice to any remedies which might otherwise be used for arrears of rent or preceding breach of covenant; and upon entry as aforesaid this lease shall determine; and said Lessee covenants that in case of such termination

it will indemnify said Lessor against all loss of rent which it may incur by reason of such termination during the residue of the term above specified. Any waiver of any breach of any covenant or condition herein contained to be kept and performed by Lessee shall not be deemed or considered a continuing waiver and shall not operate to bar or prevent Lessor from declaring [18] a forfeiture for any succeeding breach, whether of same condition or covenant, or otherwise.

IN WITNESS WHEREOF, Acme Investment Co., pursuant to resolution of its Board of Directors, has caused these presents to be executed by its President, and its corporate seal to be hereto attached; and the Lessee does likewise cause these presents to be executed by its President and its corporate seal to be hereto affixed by its Secretary in duplicate the day and year first above written.

ACME INVESTMENT CO.,
By G. CELSI, [Seal]
President.
By N. H. McEACHERN,
Secretary.
SUN DRUG CO.,
By H. J. GIER,
President.
By S. M. INKSTER, [Seal]
Secretary.

Executed in the presence of:
EDWARD J. BRAZELL.
R. O. DOWNEY.

Filed August 14, 1924. G. H. Marsh, Clerk. [19]

AND AFTERWARDS, to wit, on the 29th day of September, 1924, there was duly filed in said court an opinion, in words and figures as follows, to wit: [20]

In the District Court of the United States for the District of Oregon.

In re SUN DRUG COMPANY, Bankrupt.

OPINION.

Portland, Oregon, September 29, 1924.

Memorandum by BEAN, District Judge:

In February, 1923, the Acme Investment Company let to the Sun Drug Company certain premises in the city of Portland for a term of ten years. The lease, after the formal parts thereof recites that

> "Now therefore, in consideration of the sum of five thousand dollars in cash, and promissory note of the lessee in favor of the lessor, dated April 15, 1923, in the sum of $1600.00, the receipt of said cash and note being hereby acknowledged by the lessor, and in further consideration of the rents herein reserved, and of the covenants herein contained on the part of the lessee, to be paid and to be kept and faithfully performed by it, said lessor does hereby lease, demise and let unto said lessee" certain described premises "for the full term

of ten years beginning March 1, 1923, and ending February 28, 1933, said lessee paying and yielding as rental therefor the full sum of $134.000.00 in gold coin of the United States of the present standard weight and fineness, as follows: The advance monthly rental of $1045.00 during the first five years of this lease, and the advance monthly rental of $1195.00 per month during the last five years."

On August 24, 1924, the Sun Drug Company was adjudged a bankrupt. The lessor presented a claim for rental during the time the premises were occupied by the receiver or trustee in bankruptcy. Its allowance was denied by the referee on the ground that the five thousand dollars paid the lessor at the making of the lease was a mere security for performance of the conditions thereof by the lessee.

The law is that where, upon the making of a lease, money is deposited or advanced by the lessee as security for the performance of the covenants on his part to be performed, the lessee or his successor in interest is entitled at the termination of the lease to a return of the money less the damages. (Alvord vs. Banfield, 85 Or. 9; Moumal vs. Parkhurst, 89 Or. 248; Yuen Suey vs. Fleshman, 65 Or. 606.) But if the money is paid as a bonus or consideration to the lessor for the making of the lease, the lessee is not entitled to the return. (Dillon vs. Christie, 115 Pac. 856; Barrett vs. [21] Munro, 124 Pac. 369; Hilyers vs. Eggers, 164 Pac. 26; Curtis vs. Arnold, 184 Pac. 510.)

Now, in this case, the language of the lease in my

judgment is plain and unambiguous. There is no room for construction. It recited that in consideration of the payment of the money and the performance of the other covenants of the lease the lessee shall be entitled to the possession of the premises. There is no statement or intimation that the money was intended as security or as a guaranty or as a penalty, or as liquidated damages, but it is recited that it was as a consideration for the making of the lease.

Of course in this as in all cases involving the construction of a written contract, the intention of the parties must govern, but their intention is to be ascertained from the language used by them. The court cannot make contracts for parties, nor can it relieve them from lawful engagements deliberately and knowingly entered into.

No evidence was taken at the hearing before the referee, but he reports that it was admitted that a real estate agent procured the bankrupt as a tenant for the investment company at a total rental of $141,000 for the ten-year period, but before the lease was signed it was agreed that $6600.00 of the rental should be deducted or paid at the beginning of the lease, and the balance at the rate of $1045.00 per month for the first five years, and $1195.00 per month for the remainder of the term, and that such arrangement was intended to secure for the lessor the faithful performance of the terms by the lessee. If there were such negotiations or arrangements between the agent and the lessee, they were merged in the written instrument which evi-

dences the contract or agreement between the parties and by which their rights and liabilities are to be measured. Parol evidence is inadmissible to alter, vary or contradict its terms. (Northern Assurance Co. vs. Building Assn., 183 U. S. 308).

It is claimed that because the lessee was adjudged a [22] bankrupt a few months after the making of the lease it would be unjust and unconscionable to permit the lessor to retain the money paid as a consideration for the lease, but this affords no reason why the Court should disregard or decline to enforce the plain provisions of the contract.

It follows that the ruling of the referee should be reversed and the claim of the lessor allowed.

Filed September 29, 1924. G. H. Marsh, Clerk. [23]

AND AFTERWARDS, to wit, on the 29th day of September, 1924, there was duly filed in said court an order reversing the order of the Referee in Bankruptcy, in words and figures as follows, to wit: [24]

In the District Court of the United States for the District of Oregon.

In the Matter of SUN DRUG CO., Bankrupt.

ORDER TO PAY CLAIM OF ACME INVESTMENT CO.

The petition to review the order of the Referee

in Bankruptcy in the matter of the claim of Acme Investment Co. in the sum of $977.60 for rent accruing during the time the Receiver and Trustee were in possession of certain leased premises, came on regularly for hearing, and the Court having fully considered the matter and being fully advised in the premises, it is hereby,—

ORDERED that the order of the Referee in Bankruptcy in the matter of said claim be reversed and that the Trustee of Sun Drug Co., Bankrupt, be ORDERED to pay said claim.

Dated, September 29th, 1924.

R. S. BEAN,
Judge.

Filed September 29, 1924. G. H. Marsh, Clerk. [25]

AND AFTERWARDS, to wit, on the 28th day of October, 1924, there was duly filed in said court, a Claim of Acme Investment Company, in words and figures as follows, to wit: [26]

In the Matter of SUN DRUG COMPANY, Bankrupt.

R. L. SABIN, Trustee, Dr.
to
ACME INVESTMENT CO.

CLAIM OF ACME INVESTMENT COMPANY.

September 22, 1923. For rent of premises at 351 Washington Street, Portland, Oregon, from August 24th to September 22d, 1923, 29 days at a rental of $1045.00 per month $977.60

State of Oregon,
County of Multnomah,—ss.

N. H. McEachern, being first duly sworn, deposes and says:

That I am the treasurer of Acme Investment Co., a corporation, the claimant in the foregoing claim, and that the Trustee of Sun Drug Co., Bankrupt, is justly indebted to the Acme Investment Co. in the sum of $977.60 for rent of premises at 351 Washington Street, Portland, Oregon, from August 24, 1923, to September 22d, 1923.

N. H. McSACHERN.

Subscribed and sworn to before me this 2d day of October, 1923.

[Seal] C. F. KETTLEBERG,
Notary Public for Oregon.

My commision expires May 13, 1927.

Filed October 28, 1924. G. H. Marsh, Clerk. [27]

AND, to wit, on the 9th day of October, 1924, there was duly filed in said court a praecipe for transcript, and stipulation, in words and figures as follows, to wit: [28]

In the District Court of the United States for the District of Oregon.

In the Matter of SUN DRUG COMPANY, Bankrupt.

PRAECIPE FOR TRANSCRIPT, AND STIPULATION.

To the Clerk of the District Court of the United States for the District of Oregon.

Please make transcript of the following papers in the above-entitled matter, which, together with the petition of Trustee to review and notice of appeal, shall constitute a transcript of record to be filed in the United States Circuit Court of Appeals for the Ninth Circuit in the above matter upon petition for review by R. L. Sabin, Trustee in bankruptcy of the Sun Drug Company, petitioner, against Acme Investment Company, a corporation, respondent:

1. Petition of the Acme Investment Company for rent of premises occupied by Receiver and Trustee during administration.
2. Referee's certificate on petition to review and order disallowing claim of Acme Investment Company, which certificate includes,

(a) Petition to review Referee's order.

(b) Decision and order upon petition of Acme Investment Company.

(c) Letter of Acme Investment Company to the Sun Drug Company cancelling lease.

(d) Lease between Acme Investment Company and Sun Drug Company.

3. Memorandum opinion of Honorable Robert S. Bean upon review.
4. Order of United States District Court for the District of Oregon filed September 29, 1924, reversing order of Referee.
5. This praecipe.
6. The stipulation following.

SIDNEY TEISER,
Attorney for Trustee and Petitioner. [29]

It is stipulated between the petitioner herein and respondent herein, thru their respective counsel, that the documents and papers mentioned in the above praecipe, together with the petition of Trustee to review filed in the United States Circuit Court of Appeals for the Ninth Circuit and the notice of filing said petition for review likewise followed in said Circuit Court of Appeals for the Ninth Circuit, shall constitute the transcript of record upon appeal herein and all of the same.

Dated at Portland, Oregon, this 9th day of October, 1924.

SIDNEY TEISER,
Attorney for Petitioner.
BRICE & BRAZELL,
Attorneys for Respondent.

United States of America,
State of Oregon,
County of Multnomah.

Due service of the within praecipe is hereby accepted in Multnomah County, Oregon, by receiving a copy thereof duly certified.

_____,

Attorney for Acme Investment Company.

October 9, 1924.

Filed October 9, 1924. G. H. Marsh, Clerk. [30]

AND AFTERWARDS, to wit, on the 20th day of October, 1924, there was duly filed in said court an order fixing time to file transcript in the United States Circuit Court of Appeals for the Ninth Circuit, in words and figures as follows, to wit: [31]

In the District Court of the United States for the District of Oregon.

No. B.—7234.

October 20, 1924.

In the Matter of SUN DRUG COMPANY, Bankrupt.

ORDER FIXING TIME TO FILE TRANSCRIPT OF RECORD.

It appearing to the Court that the trustee of the above-named bankrupt has filed in the United

States Circuit Court of Appeals for the Ninth Circuit a petition to review the order of this court filed September 29, 1924. It is ordered that the said trustee is hereby directed to file the transcript of record from this court, upon which the said order was based in the said Court of Appeals on or before October 30, 1924.

R. S. BEAN,
Judge.

Filed October 20, 1924. G. H. Marsh, Clerk. [32]

AND AFTERWARDS, to wit, on the 30th day of October, 1924, there was duly filed in said court an order extending the time to file transcript of record in the United States Circuit Court of Appeals, in words and figures as follows, to wit: [33]

In the District Court of the United States for the District of Oregon.

No. B.—7234.

October 30, 1924.

In the Matter of the SUN DRUG COMPANY, Bankrupt.

ORDER EXTENDING TIME TO AND INCLUDING NOVEMBER 6, 1924, TO FILE TRANSCRIPT OF RECORD.

Now, at this day, for good cause shown, IT IS

ORDERED that the time for filing the transcript of record in this cause and docketing the same in the United States Circuit Court of Appeals for the Ninth Circuit, be, and the same is hereby extended to and including November 6, 1924.

R. S. BEAN,
Judge.

Filed October 30, 1924. G. H. Marsh, Clerk. [34]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
District of Oregon,—ss.

I, G. H. Marsh, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that I have prepared the foregoing transcript, pursuant to the direction of the foregoing praecipe for transcript, and that the foregoing pages numbered from 1 to 34, inclusive, constitute the transcript of record in the cause in bankruptcy in said court in which the Sun Drug Company was the adjudged bankrupt and the Acme Investment Company is a creditor and that the foregoing pages contain a full, true, and complete transcript of the record and proceedings had in said court in said cause which the said praecipe directs shall be included therein as the same appears of record and on file at my office and in my custody.

I further certify that the cost of the foregoing transcript is $8.45, and that the same has been paid by the trustee of the said bankrupt.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Portland, in said district, this 31st day of October, 1924.

[Seal] G. H. MARSH,
Clerk. [35]

[Endorsed]: No. 4358. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of Sun Drug Company, Bankrupt. R. L. Sabin, as Trustee in Bankruptcy of the Sun Drug Company, Petitioner, vs. Acme Investment Company, a Corporation, Respondent. Transcript of Record in Support of Petition for Revision Under Section 24b of the Bankruptcy Act of Congress, Approved July 1, 1898, to Revise, in Matter of Law, an Order of the United States District Court for the District of Oregon.

Filed November 3, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4358

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of SUN DRUG COMPANY, BANKRUPT

R. L. SABIN, as Trustee in Bankruptcy of the SUN DRUG COMPANY,

Petitioner,

vs.

ACME INVESTMENT COMPANY, a Corporation,

Respondent.

Brief for Petitioner

SIDNEY TEISER,
Portland, Oregon,
Attorney for Petitioner.

BRICE & BRAZELL,
Attorneys for Respondent.

No. 4358

United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of SUN DRUG COMPANY, BANKRUPT

R. L. SABIN, as Trustee in Bankruptcy of the SUN DRUG COMPANY,

Petitioner,

vs.

ACME INVESTMENT COMPANY, a Corporation,

Respondent.

Brief for Petitioner

STATEMENT OF FACTS

On the 15th of February, 1923, the Sun Drug Company entered into a lease, as lessee, with the Acme Investment Company, as lessor, of a building in Portland, Oregon, to be used as a drugstore. (Transcript, pp. 24-31.) Thereupon, the Sun Drug Company proceeded to occupy the building and undertook the due performance of the covenants of the lease. On July 28, 1923, the Acme Investment Company, lessor, notified the Sun Drug Company, lessee,

on account of an alleged breach of covenants, to vacate the premises on or before August 1, 1923. (Transcript, p. 23.)

Shortly thereafter the Sun Drug Company filed its petition in bankruptcy and was adjudicated bankrupt. A Receiver was appointed, and in due time a Trustee was elected—namely, the Petitioner herein. The Trustee occupied the leased premises until the stock of drugs could be inventoried and disposed of. Thereafter the Acme Investment Company filed a claim against the estate in bankruptcy for the occupancy of the premises by the Trustee, and petitioned the Court for its payment. (Transcript, pp. 36 and 37.) The Trustee thereupon objected to the payment of the claim asserted, for the reason that under the lease in question between the Acme Investment Company and the Sun Drug Company, the Sun Drug Company had, upon executing the lease, turned over to the Acme Investment Company the sum of $5,000.00 and its ninety-day note for $1,600.00 (Transcript, pp. 19, 25 and 32) and that this sum had in truth and in fact been deposited by the Sun Drug Company with the Acme Investment Company as security for the faithful performance of the lease, notwithstanding that under the terms of the lease it was asserted that said money and note were given in consideration of the lease; the Trustee taking the position, therefore, that the Acme Investment Company, having within about five months of the entering into of the lease notified the tenant to quit, was holding $5,000.00 of the tenant's money and that any claim for rent asserted by the

Acme Investment Company against the estate should be offset as against the monies thus held as security by the Acme Investment Company.

Upon the hearing of the claim and petition of Acme Investment Company and the objections of the the Trustee thereto, no evidence was taken, but counsel for the Trustee and counsel for the Acme Investment Company agreed as to the facts. The Referee states these facts in his decision and order as follows: (Transcript, pp. 18-19.)

> "The agreed facts in the dispute are that a few months before this failure a real estate agent procured the Sun Drug Company as a tenant for the Acme Investment Company at a total rental of $141,000 over a ten-year period which would be at the rate of $1,180 per month. Before the lease was signed it was agreed that said total rent of $141,000 should be so distributed as that $6,600 should be deducted or paid at the signing of the lease and that the balance of $134,400 should be paid during the term at the rate of $1,045 for the first five years and $1,195 for the last five years, thus completing the total contract of $141,000. It was conceded at the hearing that the purpose of the parties in thus disposing of the consideration was to *secure to the lessor the faithful performance of the lease* by the Sun Drug Company.
>
> "The lease itself, after the formal parts, covers the subject in this language:
>
> > " 'Now therefore, in consideration of the sum of Five Thousand ($5,000.00) Dollars in cash and the promissory note of the Lessee in

favor of the Lessor due April 15th, 1923, in the sum of Sixteen Hundred ($1,600.00) Dollars, the receipt of said cash and note being hereby acknowledged by the Lessor, and in further consideration of the rentals herein reserved, and of the covenants herein contained on the part of the Lessee, to be paid and to be kept and faithfully performed by it, said Lessor does hereby lease, demise,' etc.

"Prior to the filing of the petition in bankruptcy, as shown by the exhibits in the case, the Acme Investment Company cancelled this lease and notified the tenant to quit."

QUESTION INVOLVED

The question, therefore, is: Is the landlord, the Acme Investment Company, entitled to retain the $5,000.00 cash paid under the aforesaid situation, plus the monthly rents that were received, and also to recover against the Trustee the rental for the period of the Trustee's occupancy without the right of the Trustee to offset the amount due by the estate to the Acme Investment Company for rent during the period of administration against the $5,000.00 received by the Acme Investment Company at the time of the entering into of the lease?

The Referee in Bankruptcy held that, notwithstanding the lease stated in terms that the $5,000.00 paid at the time of the entering into of the lease together with the giving by the Lessee of the ninety-day

note for $1,600.00 and an agreement to pay monthly rentals were the consideration for the lease, yet the facts and circumstancs and admitted intentions of the parties were that the *$5,000.00 cash payment and the note were paid and given as security for the due performance of the lease* and that under the law, as interpreted by the Oregon decisions, where money in fact is deposited as security "for the faithful performance of the lease even though the language of the lease itself tends to indicate the contrary * * * the retention of the money secured under such circumstances will be regarded as a penalty or forfeiture and upon termination of the lease by the landlord he must pay back the money deposited." (Transcript, pp. 20-21.) It was therefore ordered by the Referee that the petition of the Acme Investment Company to require the payment by the Trustee of rental for the use of the premises by the Trustee be disallowed. (Transcript, p. 23.)

Upon review of this decision by the District Court of the United States for the District of Oregon the District Court held that the language of the lease was plain and unambiguous and that parole evidence was not admissible to alter or vary the terms of a written contract and that therefore the plain provisions thereof should be enforced as written. (Transcript, pp. 32-35.) The order of the Referee was, therefore, reversed.

ERROR ALLEGED

The error alleged is the failure of the District Court, in the interpretation of the lease, to look to the admitted intentions of the parties in depositing the $5,000.00 in question and in determining that the situation presented an issue as to whether or not the plain terms of a written contract could be varied by parole evidence.

ARGUMENT

From what has been stated it will be seen that the questions to be discussed here are not complex, and we shall endeavor to analyze them without undue prolixity.

It should be premised that:

I

In the interpretation of a contract by a Court of Bankruptcy its construction and validity must be determined by the laws of the state.

See:

In re Hartdagen, 198 Fed. 486, 548;

Scandinavian-American Bank v. Sabin, (C. C. A. 9th Cir.) 227 Fed. 579, 582;

Humphrey v. Tatman, 198 U. S. 91; 25 Sup. Ct. 576, 569; 9 L. Ed. 956; 14 A. B. R. 74;

York Mfg. Co. v. Cassel, 201 U. S. 344, 26 Sup. Ct. 481, 484; 50 L. Ed. 782, 15 A. B. R. 633;

Thompson v. Fairbanks, 196 U. S. 516; 25 Sup. Ct. 306, 308; 49 L. Ed. 577, 13 A. B. R. 437.

Consequently in the interpretation of the lease in question we must look to the laws as promulgated by the courts of last resort in Oregon and we are not concerned with the law as promulgated in other states, since the lease was made in Oregon, upon Oregon property, and was to be carried out and performed in Oregon.

Now the terms of the lease provide that,

"* * * in consideration of the sum of Five Thousand ($5,000.00) Dollars in cash and the promissory note of the Lessee in favor of Lessor due April 15th, 1923, in the sum of Sixteen Hundred ($1600.00) Dollars, the receipt of said cash and note being hereby acknowledged by the Lessor, and in further consideration of the rentals herein reserved, and of the covenants herein contained on the part of the Lessee to be paid and to be kept and faithfully performed by it, said Lessor does hereby demise and let unto said Lessee that certain store, * * * *." (Transcript, p. 25.)

It will be seen that the consideration for the lease was:

1. $5,000.00 in cash.
2. Note of $1600.00.
3. The stated rentals aggregating $134,400 payable in monthly installments as set forth therein.

4. The performance by the Lessee of the covenants therein contained.

At the time of the entering into of the lease it was agreed that the total rentals upon the premises for the ten-year term should be $141,000 and instead of distributing these rentals equally over each month of the ten years it was determined to distribute the same as follows: $6,600.00 at the time of the entering into of the lease ($5,000.00 being in cash and $1,600.00 in a ninety-day note) and the balance in installments of $1,045.00 for each month of the first five years and $1,095.00 for each month of the last five years, bringing the total to the agreed rental of $141,000.00 for the entire term. As stated by the Referee,

> *"It was conceded at the hearing that the purpose of the parties in thus disposing of the consideration was to secure to the Lessor the faithful performnace of the lease by the Sun Drug Company."*

That is to say, that the purpose of requiring the payment of the $6,600.00, $5,000.00 of which was paid in cash and $1,600.00 by negotiable note, was *security,* and upon the payment of the same, or agreement to pay the same, this sum was deducted from the rental agreed to be paid, to-wit: $141,000.00, leaving to be distributed in monthly payments during the term a balance of $134,400.00. From each month's rent as originally agreed there was deducted a proportionate amount of the $6,600.00 which latter sum, as

heretofore stated, was required to be paid in a lump sum prior to or at the time of the entering into of the lease as a security or assurance that the terms of the lease would be performed.

The Oregon courts have stated time and again the doctrine (as have also the courts of many other states) that

II

When money is deposited or paid to a Lessor as security for the performance of a lease and the lease is terminated by the Lessor, the Lessee or its or his representative is entitled to recover the amount of money paid as such security less the damages resulting and this notwithstanding that the language of the lease specifically states that such deposit or money paid shall be considered as liquidated damages and shall be retained by the Lessor.

See:

Moumal v. Parkhurst, 89 Ore. 248, 251-255;

Alvord v. Banfield, 85 Ore. 49;

Yuen Suey v. Fleshman, 65 Ore. 606.

The Oregon Supreme Court in the case of Moumal v. Parkhurst, supra, said:

"For the purposes of this opinion all of the material allegations of the complaint are deemed to be true and the question presented is whether,

under the terms and provisions of the lease, the $10,000.00 was a deposit or an actual payment, and whether the money is to be treated as a penalty or as liquidated damages. There is no provision in the lease for a reletting of the premises by the landlord on account of the tenant for nonpayment of rent or the breach of any covenant. It is alleged that the defendants evicted plaintiff from the premises and thereby terminated the lease and plaintiff's tenancy; that defendants have been in possession ever since and have collected the rents. * * * Assuming that the lease was terminated, it is the defendants' contention that the $10,000.00 was an actual payment by plaintiff to defendants at the time the lease was executed and that through a failure of the plaintiff to pay rental as provided for in the lease they are now entitled to keep and retain the money as a penalty under the terms and provisions of the lease. * * *

"Under the record we construe the lease to mean that the $10,000.00 was a deposit with the lessors; that the title to the money remained in the lessees, subject to the terms and conditions of the lease, and that it was not an actual payment to the lessors at the time of the execution of the lease. The question is then presented as to whether the $10,000.00 is a penalty or liquidated damages. The case of Cummingham v. Stockton, 81 Kan. 780 (106 Pac. 1057, 19 Ann. Cas. 212), is almost identical with the case at bar and it was there held:

" 'That the deposit could not, under the circumstances, be regarded as liquidated damages, and that when the landlord elected to dispossess

the tenant he terminated the lease and ended the obligation of the tenant under it for the remainder of the term and was not entitled to retain the deposit, except so much of it as was necessary to pay the rentals which had accrued when possession was taken.'

"In Caesar v. Rubinson, 174 N. Y. 492 (67 N. E. 58) it was held that:

" 'The landlord, having asserted his right to reenter for failure of the tenant to pay a monthly rent of $45.", * * * thereby waived the claim to the deposit except so far as it was necessary to apply it in payment of rent then due or accrued.'

"The New York case is cited and approved by this court in a well-considered opinion by Mr. Justice Ramsey in the case of Yuen Suey v. Fleshman, 65 Ore. 606-613 (133 Pac. 803), in which the facts were very similar to those in the present case. It was there held that:

" 'The $5,000.00 deposited by the respondent should be regarded as a penalty to secure the performance of the conditions of the lease on the part of the lessee, and *not* as liquidated damages.'

"In that case the appellant elected to terminate the lease for nonpayment of rent and ejected the respondent by an action at law. It was said that:

" 'This effectually terminated the tenancy and exonerated the lessee from all liability for rent not due at the time of such ouster.'

"The same rule is laid down in the case of Northern Brewery Co. v. Princess Hotel, 78 Ore. 453 (153 Pac. 37) and the rule is sustained by the weight of authority.

"We hold that under the terms and provisions

of the lease the $10,000.00 was a deposit and was not an actual payment; that it should be treated as a penalty and not as liquidated damages."

And in the case of Alvord v. Banfield, supra, it is said:

"This brings us to the question: Was the $2,500.00 deposited as security for the performance of the covenants or was it under the stipulation of the demise liquidated damages? As a general rule the intention of the contracting parties is an important, if not a conclusive, element in determining whether a sum stipulated to be paid in case of the breach of a contract is to be regarded as liquidated damages or a penalty. Modern authorities attach greater importance to the meaning and intention of the parties than to the language of the clause designating the sum as a penalty or as liquidated damages: Salem v. Anson, 40 Ore. 339 (67 Pac. 190, 91 Am. St. Rep. 485, 56 L. R. A. 169); Wilhelm v. Eaves, 21 Ore. 194 (27 Pac. 1053, 14 L. R. A. 297). The tendency and preference of the law is to regard the stipulation or covenant as of the nature of a penalty rather than as liquidated damages, for the reason that then it may be apportioned to the actual loss sustained and compensation for such loss is the full measure of right and justice. Where the circumstances and the nature of the stipulation are such that the actual damages are not ascertainable with any degree of certainty the rule stated does not apply. If there is an agreement for a fixed, unvarying sum, without regard to the date of the breach, when in the very nature of things the date

of the breach would be all-important in determining the element of actual damages, the stipulation must be held to be one for a penalty: 8 R. C. L., Sec. 114, p. 564; note, Ann. Cas. 1912C, p. 1025. In Section 115 of 8 R. C. L., p. 567, the author states:

"'In other words, the damages stipulated for must be such as to amount to compensation only, and if the principle of compensation has been lost sight of the sum named will be treated as a penalty.'"

Now it may be stated here that it is not claimed that the terms of the leases in the cases of Alvord v. Banfield and of Moumal v. Parkhurst are the same as in the case at bar. They are not. But the principles involved are the same. That is to say, the doctrine is promulgated that, notwithstanding the terms of a lease are unambiguous and clearly provide that certain monies paid at the time of the entering into of the lease or then deposited are to be considered as liquidated damages or are to be considered as the full measure of damages or are to be considered as payment or as anything other than a penalty or security when in fact and in truth the intentions of the partie were that they were to be deposited or paid as security for the performance of the lease or to be a penalty for the failure to perform the same, the courts of equity will go behind the plain and unambiguous language of the contract for the purpose of determnining the intention of the parties and will seek out this intention and if it be found that the intention

was that the monies deposited or paid were deposited and paid as security for the performance of the lease or as penalty for failure to perform the same they will not enforce such provision but upon the termination of the lease by the landlord will require that the landlord pay back to the tenant the monies thus paid and deposited, less such damages as the landlord has suffered.

It will be seen, therefore, that the question in cases of this character is not one of varying the terms of a contract by parole evidence, as the District Court held. The fact is, the courts in cases of this kind concede that the language of the contract is clear but, notwithstanding the clearness of such language, parole evidence is heard for the purpose of discovering the intentions of the parties and when that intention is discovered equity not only varies the terms of the written contract but contradicts them. Time and time again have courts of equity held that where such intention is discovered irrespective of the language of the contract it will not enforce a penalty. So we maintain that the District Court lapsed into error in treating the subject involved as one involving the varying of the terms of a contract by parole evidence. The situation did not fall into such category.

However, even considering the case upon the theory of the decision of the District Court, we call the attention of the Court to the fact that

III

The language of the contract is not plain and unambiguous.

As heretofore stated, the lease provides that "in consideration of the sum of $5,000.000 in cash and the promissory note of the Lessee in favor of the Lessor due April 15, 1923, in the sum of $1,600.00, the receipt of said note and cash being hereby acknowledged by the Lessor and in further consideration of the rentals herein reserved and of the covenants herein contained on the part of the Lessee to be paid and to be kept and faithfully performed by it, said Lessor does hereby demise and let unto the said Lessee certain premises."

Now under these terms, what was the $5,000.00 in cash and the 1,600.00 in note given for? The terms of the lease say that in consideration of this cash and note and of the rentals reserved and of the faithful performance of the covenants the Lessor leases the premises in question. It does not, however, say that in consideration of the PAYMENT of the sum of $5,000.00 any more than it says in consideration of the SECURITY of $5,000.00. It does not even acknowledge the PAYMENT of the $5,000.00. But it specifically says the *"receipt"* of said cash and note "being hereby acknowledged". The question therefore very properly arises, was such sum deposited as "security" or as "payment"? Or, again, let us suppose that the first year's rentals had been paid—that

is to say, that the $5,000.00 in cash and the $1,600.00 note and the first year's rentals had been paid, and then the lease had been terminated by the Lessor within five months of the entering into thereof. Would the Lessor have a right to retain the rentals also? There would have been as much a consideration of the lease, had they been paid, as the $5,000.00 was. So we maintain and urge that the language of the lease, even taking the view of the District Court, is ambiguous and that by virtue of the doctrine promulgated by all courts under such circumstances parole evidence of the intention of the parties in the making of the lease was admissible in order to read the lease equitably and understandingly.

CONCLUSION

The parties in this case came together on the 15th day of February, 1923, with the definite understanding and intention that there was to be paid for the ten-year lease upon the premises the sum of $141,000.00, or approximately $1,175.00 per month. It was then agreed that there should be deposited or paid the sum of $5,000.00 in cash (and a ninety-day note of $1,600.00 given) *as security for the performance of the lease* and that the balance of the $141,000.00 should be distributed over the ten-year period —that is to say, during each month of the first five years the sum of $1,045.00 was to be paid and over each month of the second five years the sum of $1,095.00. Within approximately five months after

the payment of the $5,000.00 and the giving of the note for $1,600.00, the Lessor terminated the lease and notified the tenant to quit, claiming the right to retain the $5,000.00 plus the monthly rentals received as payment upon the lease. It is maintained that in view of the Oregon authorities quoted the real intention of the parties should be looked into and determined in interpreting this lease. And it is further maintained under these authorities that when such intention is inquired into, as it should be, it must follow that the $5,000.00 in question was deposited as security, and that upon the termination of the lease by the Lessor such security must be surrendered less such damages as the landlord has suffered.

It follows, therefore, that the Lessor, Acme Investment Company, has in its possession, belonging to the estate in bankruptcy, the sum of $5,000.00 and that said $5,000.00 should be subject to a set-off for the amount of the rent which the Trustee in Bankruptcy owes to it by reason of his occupancy of the premises during process of administration.

Respectfully submitted,

SIDNEY TEISER,
Attorney for Petitioner.

No. 4358

United States

Circuit Court of Appeals

For the Ninth Circuit

In the Matter of SUN DRUG COMPANY, Bankrupt,

R. L. SABIN, as Trustee in Bankruptcy of the SUN DRUG COMPANY,

Petitioner,

vs.

ACME INVESTMENT COMPANY, a Corporation,

Respondent.

Respondent's Brief

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No. 4358

United States

Circuit Court of Appeals

For the Ninth Circuit

In the Matter of SUN DRUG COMPANY, Bankrupt,
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Respondent's Brief

STATEMENT OF FACTS

Acme Investment Co. leased to Sun Drug Co. the premises at 351 Washington Street, Portland, Oregon, for a ten year period beginning February,

1923, at a monthly rental of $1045.00 for the first five years and $1195.00 for the last five years of the term; the total rentals aggregating $134,400.00.

At the time of making said lease and in consideration of the execution thereof the Lessee paid the Lessor Five Thousand ($5,000.00) Dollars in cash and delivered its promissory note in the sum of Sixteen Hundred ($1600.00) Dollars due April 15th, 1923, bearing interest at six per cent. (6%), said note never having been paid. On July 28th, 1923, owing to the failure of Lessee to pay the June or July rent, Lessor served notice of cancellation of lease, but continued to treat the lease as in full force.

Thereafter and in September, 1923, the Lessee filed a voluntary petition in bankruptcy and was adjudicated a bankrupt.

The Lessor filed a claim against the Trustee in the sum of $977.60 for rent accruing during the time the Receiver and Trustee were in possession of the premises. The Trustee objected to allowance of said claim on the theory that the $5,000.00 paid by the Lessee to the Lessor at the time of the execution of the lease constituted a deposit as security for the lease which should be applied in payment of the rent accruing during the time the Receiver and Trustee were in possession of the premises.

That part of the lease referring to the payment of said $5,000.00 reads as follows:

> "Now therefore, in **consideration of the sum of Five Thousand ($5,000.00) Dollars in cash,** and the promissory note of the Lessee in favor of Lessor due April 15th, 1923, in the sum of Sixteen Hundred ($1600.00) Dollars, the receipt of said cash and note being hereby acknowledged by the Lessor, and in further consideration of the rentals herein reserved, and of the covenants herein contained, on the part of the Lessee to be paid and to be kept and faithfully performed by it, said Lessor does hereby lease, etc."

In no other part of the lease is the said $5,000.00 mentioned. The words "Deposit" or "Security" do not appear in the lease, nor is there any provision for the payment of interest on said sum to the Lessee. The $1600.00 note provides for the payment of six per cent. (6%) interest by Lessee.

The Referee held that the $5,000.00 cash and the $1600.00 note given by Lessee to Lessor at the time of making the lease did not constitute a consideration, bonus, or inducement for the execution of the lease, but was a payment given to secure the faithful performance of the lease; that therefore title thereto did not pass to the Lessor, but became assets of the bankrupt, Lessee's estate.

Thereafter the Lessor, Acme Investment Co., filed a petition to review the order of the Referee, and the District Court of the United States for the District of Oregon made an order reversing the order

of the Referee and directing the Trustee to pay the claim for rent.

QUESTION INVOLVED

The sole question for decision in this matter is whether the said sum of $5,000.00 so paid by Lessee to Lessor at the time of the making of the lease is to be considered a deposit for rentals due or to become due under the lease, or whether it is to be deemed money paid as a consideration or bonus for the execution of the lease. If it be a deposit, the money belongs to the Lessee, being merely held in trust by the Lessor for him. But, if instead of a deposit it is money paid as consideration or bonus for the execution of the lease, then title thereto immediately passed to the Lessor and it is the absolute owner thereof, without any claim or interest therein either in favor of the Lessee or the Trustee in Bankruptcy.

ARGUMENT

In determining the question in issue it is necessary to consider the language of the lease so far as it relates to said payment of Five Thousand ($5,000.00) Dollars, because the lease speaks for itself and shows the expressed intention of the parties. As stated by Judge Bean, the lease is plain and unambiguous. It is elementary that all prior negotiations respecting the lease are merged in the written instrument and that parol evidence is inadmissible to alter, vary, or contradict its terms.

No testimony was taken either before the Referee or the District Judge. The Referee in his decision states that in a preliminary oral arrangement had between the Lessee and a rental broker representing the Lessor, the rental for the term was agreed upon at $141,000.00, but that before the lease was signed the Lessor required $6,600.00 to be paid it as consideration therefor, and only exacted rentals during the period of the lease aggregating $134,-400.00; that by reason thereof the money paid at the time of the execution of the lease as consideration therefor, and so acknowledged to be such in the lease, was in reality a deposit. The Referee also says that it was conceded that such arrangement was to secure to the Lessor the faithful performance of the lease. If the Referee means by his language to say that the Lessor insisted on this arrangement to protect its interest, he is correct, but if he means to convey the impression that the Lessor intended that the initial payment made at the time of the execution of the lease was to be a deposit or security for the lease, he is decidedly in error. Neither the Lessor nor its attorneys have ever stated or admitted that the initial payment was inended as security or as a deposit, but have always insisted and do now insist that the lease as drawn contains and correct statement of the final agreement of the parties.

The Referee, in his decision, entirely ignored the language of the lease, which is plain and unambig-

uous, and preceeds to set up as the alleged true and real agreement of the parties, not the formal document to which they attached their signatures, but the preliminary oral arrangement had between the rental broker and the Lessee.

If the rule adopted by the Referee were to be upheld, it would be useless to go through the formality of drawing up or executing written instruments. They would indeed become scraps of paper. Every person, when it was his advantage so to do, would claim that the written contract he signed did not contain a true statement of his agreement, but that something else was intended. The sanctity which the law has thrown around written instruments, based on generations of experience, would be destroyed, and written instruments would cease to exist.

The ruling of the Referee, however, is not the rule followed by the Supreme Court of the United States. See Northern Assurance Co. vs. Grand View Building Co., 183 U. S. 308.

The Referee based his right to set aside the formal document executed by the parties and to substitute therefor the preliminary oral arrangement or talk had between the Lessee and the rental broker, on the strength of three Oregon decisions, to-wit:

Alford v. Banfield, 85 Ore. 49,
Moumal v. Parkhurst, 89 Ore. 248,
Yuen Suey v. Fleischman, 65 Ore. 606.

We beg to submit that even a cursory examination of said cases will disclose that they do not support the Referee's decision. They are cases involving leases in which money was deposited as security for the payment of rent and providing that in event of default and cancellation of the lease the money so deposited should be retained by the Lessor as liquidated damages for breach of lease. The Court held it could be shown that the retention of the deposit was in reality a penalty, notwithstanding the lease denominated such retention as liquidated damages. This is a mere application of a universal rule of law.

In the present case there is no question of either "penalty" or "liquidated damages" nor are either words used in the entire lease. In the Oregon cases mentioned the words "deposit" and "as security for the payment of rent" were employed, and the lease further provided in each case for the payment of interest on said "deposit" and provided for the credit of the amount of said deposit as rental at the end of the term. These cases, we submit, have no bearing or application whatever on the issues of law raised in this case.

A careful review of the Digests discloses that there are no decisions by the Supreme Court of Oregon involving a situation similar or analogous to the present case where money is paid by the Lessee to the Lessor at the time of and as consideration for the execution of the lease.

This precise case, however, has been presented to other Courts for decision as we shall hereinafter show, and in all cases where money has been paid by the Lessee to the Lessor in consideration of the execution of the lease, the courts have uniformly held that such money constitutes a payment to the Lessor fully earned by the Lessor by the execution of the lease, and they have consistently refused to hold such payment as a deposit or security for the lease, or to recognize that the Lessee has any claim to or interest therein.

We beg to submit the following authorities as sustaining the doctrine we are herein contending for:

Dutton vs. Christie, 115 Pac. 856 (Wash.)
Barrett vs. Monro, 124 Pac. 369 (Wash.)
Ramish vs. Workman, 164 Pac. 26 (Cal.)
Curtis vs. Arnold, 184 Pac. 510 (Cal.)
Galbraith vs. Wood, 144 N. W. 948 (Min.)
Forgotston vs. Brafman, 84 N. Y. S. 237.
Ann. Cas. 1915 B Note, Page 613.
50 L. R. A. (N. S.) 1034.
16 R. C. L. 931.
36 C. J. 296.

In Dutton vs. Christie the Lessees under a written lease paid the Lessor the sum of $1500.00 upon the execution of the lease, which payment was covered by the following paragraph embodied in the lease:

> "In consideration of the covenants of the second parties (the Lessee) hereinafter set forth, and of the sum of $1500.00 now paid to the first parties by the second parties, receipt of which is hereby acknowledged."

and in a subsequent paragraph of the lease it is stipulated,

> "That the above payment of $1500.00 now made shall, in the event of full and faithful performance of this contract by the second parties, be credited as payment of rent for the last two months of the term."

Later and in the following year the Lessees being in arrears of rent moved out of the premises and the Lessors retook possession. In the litigation that followed for the collection of rent in arrears by the Lessor, the Lessee contended that this sum of $1,-500.00 which was paid in advance was intended as a deposit in the nature of a penalty for any failure on their part to carry out the terms of the lease; that to allow the landlord to retain this money and at the same time have judgment for rent in arrears would be to enforce a forfeiture or penalty, and demanded that this sum should be treated as a set off against the landlord's claim for rent in arrears, which would leave a balance in their favor of $439.10. The Court in an able decision by Ellis J. held for the landlord and against the Lessee. The facts being so similar to those of the instant case it is deemed best to quote from said opinion somewhat at length:

"We cannot agree with this contention without in effect writing a new contract for the parties."

"In the beginning of the lease the parties have declared that the lease is given in consideration of the covenants of the second parties and of the payment of $1500.00. The lease was certainly a legally sufficient consideration for the payment. If there had been no further mention of this money, there could be no question of the landlord's ownership of it. Do you think the added stipulation that this payment shall, in the event of full performance of the contract by the second parties, be credited in payment of the rent for the last two months of said term, but otherwise said payment this day made shall belong to the first parties as a part of the consideration to them for the execution of this lease . . . . change the nature of this payment from consideration to penalty. We think not. It is declared to be a part of the consideration in the beginning, and this clause reiterates the same thing. In both instances the ownership of the respondent therein is affirmed. This is not changed but an agreement to apply this sum in payment of the rent for the last two months of the term in the event of the appellants (Lessees) fully performing their contract. It was only by that

performance that they could assert any claim on this money. They must earn it."

"The fact that the respondent (the Lessor) was willing to forgo $1500.00 of the consideration of the lease in order to encourage the faithful performance of their covenants by the Lessees, is no good reason, either in law or in morals for penalizing **him** in that amount for **their** failure to perform."

"The money was not deposited as security. There was merely a stipulation that it should be applied as payment of rent upon a condition which has never been performed. There is a manifest difference between a deposit for security and a stipulation for a reduction of consideration upon contingency."

"When the appellants paid this money as a consideration for the lease, the title to it passed to the respondent. Their breach of the lease cannot divest this title."

In the case of Ramish vs. Workman, Supra, involving a lease for a ten year period, the lease recited that the lessees paid to the lessor "As further consideration for this lease in addition to the rent herein reserved the sum of $7200.00" and "That if lessees shall pay the rent herein reserved when the same becomes due hereunder and shall well and truly perform and observe all the covenants and agreements herein contained on their part to be performed and reserved during the first nine years

seven months and twelve days of this lease, and this lease shall not be terminated by the re-entry of the lessor as hereinafter provided within said period of nine years, seven months and twelve days, he will credit the sum of $7200.00 hereinafter provided to be paid to him by the lessees upon the last four months and eighteen days rent under this lease."

Default having been made in the payment of rent, the lessor obtained possession of the premises by an F. E. D. action and then filed an action for back rent.

The lessee filed a counterclaim alleging that the $7200.00 paid when the lease was executed constituted a deposit which should be returned to the lessee after deducting accrued rent.

The Court held that the $7200.00 was not a deposit, but was a payment made in consideration of the execution of the lease which belonged to the lessor absolutely, and that the lessee had no interest therein.

In the course of its opinion the Court said:

> "Appellant's chief ground for reversal, and upon which they devote much of their argument, is based upon the provision of the lease pursuant to which they paid plaintiff $7200.00, claim to which is asserted in both the answer and cross-complaint. Notwithstanding the plain language in which the provision is couched, the meaning of which, to our minds,

admits of no controversy, they insist that it should be construed as security for the payment of the rent reserved during the time ending with their eviction and any damages sustained by the plaintiff; that when the landlord elected to evict defendants from the premises for nonpayment of rent he waived all claim to the $7200.00, except in so far as it was necessary to apply it in payment of rent then due or accrued. As stated in Dutton v. Christie, 63 Wash. 373, 115 Pac. 857, where a similar question was involved: 'We cannot agree with this contention without in effect writing a new contract for the parties.'

"Clearly the $7200.00 was paid for a ten-year lease of the premises, upon the conditions and terms specified therein. Defendants parted with the money, not as a penalty or as security, but as a payment the consideration for which was the execution of the lease on the part of plaintiff. The title thereto passed absolutely to the lessor, unaffected by the fact that he agreed, upon the performance of certain conditions by defendants, to give them credit therefor. The conditions were never performed by defendants, and hence they could have no claim to the fund. The authorities which appellants cite in support of their contention all appear to have been cases where the deposits was made with the lessor upon the

execution of the lease as security for the payment of the rent, and in such cases, upon the lessor evicting the tenants, it is uniformly held that he cannot assert claim to the amount so deposited, over and above rent due, with damages sustained. The cases cited by appellants involve deposits made as "a guaranty," as "a penalty," "for security", etc., and hence are readily distinguished from the case at bar. This view finds full support in the case of Dutton v. Christie, Supra."

"The provisions of the lease in question hereinbefore quoted should be interpreted in accordance with the plain import of the language used, and, thus construed, it is clear that the parties intended the $7200.00 to be in the nature of a bonus or additional consideration paid the Lessor as an inducement to make the lease upon the terms and conditions therein contained; and, as stated, the fact that upon the performance of all the covenants and agreements contained in the lease to be performed by the lessors during the first nine years, seven months and twelve days of the term thereof he promised in effect to release them from the payment of rent at the rate of $1500.00 per month for the last four months and eighteen days of the term so demised furnishes no reason for appellants' contention."

A case directly in point is the case of,—In Pil-

chard Motor Car Co., Bankrupt, decided by Judge Wolverton of the United States District Court for the District of Oregon in memorandum opinion in the Spring of 1924.

In the Pilchard Motor Car Case involving a lease for a term of years at a rental of $500.00 per month, the sum of $2,000.00 was paid by the Lessee to the Lessor at the time of the execution of the lease and as consideration therefor. The lease provided that if Lessee duly complied with the terms of the lease, the rent for the last four months would be $1.00 per month. After the Lessee was adjudicated bankrupt the Trustee claimed that the money so paid to the Lessor by the Lessee as consideration for the execution of the lease was intended to be and constituted a deposit as security for the rent, title to which did not pass to the Lessor, and that said money constituted assets of the bankrupt's estate. Judge Wolverton cited several of the cases hereinbefore mentioned and held that the language of the lease governed and that as the lease recited that it was paid as consideration for the lease, the money belonged to the Lessor and was not a deposit as security for the lease. The Referee, in his decision, makes no reference to the Pilchard Motor Car Case, but attempts to differentiate this case from it because in that case the $2,000.00 paid by the Lessee to the Lessor at the date of entering into the lease was paid as consideration for the rental of premises on which the Lessor agreed to construct a building which the Lessee was to occupy.

Manifestly when money is paid as consideration for the execution of a lease, the legal effect of such payment is the same whether the Lessor leases a building already erected or leases a building to be thereafter constructed by him.

As a matter of interest, nearly all the cases we have cited in this brief involve the leasing of a building already completed.

The cases cited herein fully sustain the doctrine of law we are contending for, and as a matter of fact a careful research of all the authorities discloses no case holding a contrary doctrine.

Counsel for petitioner argues that the lease is not plain and unambiguous because it does not say that $5,000.00 was **paid** to the lessor. The lease expressly acknowledges receipt of the money by the lessor, and recites that it is **received** by the lessor **as consideration for the execution of the lease.** We do not see how words could make the language and meaning of the lease any plainer or clearer.

Counsel for petitioner, on pages 15 and 16 of his brief, submits a query. He says: "Suppose that at the time of the execution of the lease the Lessee had paid Lessor $5,000.00 as consideration for the lease and had also at the same time and pursuant to its terms paid the first year's rental in advance, and that five months thereafter the Lessor on account of some violation of the lease by the Lessee and for just cause had terminated the lease."

"What right," he asks, "would the Lessor have to retain the advance rent paid him for the remaining seven months of the first year?"

We submit that in our opinion the Lessor could retain the advance rent for the remaining seven months just exactly as he could if no money had been paid him as consideration for the execution of the lease.

In other words,—we believe that if a tenant rents a place for one year and pays the full years' rent in advance pursuant to the terms of the lease, and thereafter before the expiration of the year violates the covenants of the lease justifying a re-entry by the landlord, and the landlord does make a re-entry, he is not required by law to make a refund to the tenant for the remainder of the year.

This precise question was decided by the Supreme Court of Minnesota in Galbraith vs. Wood, 144 N. W. 945, where the Court uses the following language:

> "Where rent has been paid in advance under an agreement that it shall be so paid, and the Lessor re-enters for condition broken, he is entitled to retain the rents so paid, though the re-entry is before the expiration period for which the rent is paid."

In the course of his decision the Referee states that it is an injustice to permit the Lessor to retain the $5,000.00 paid as consideration for the lease,

and also to collect the stipulated monthly rental during the time the Lessee occupied the premises. As a matter of fact the Lessor did not collect rent for the two months preceding the bankruptcy of the Lessee, and the premises were vacant for some time after the Trustee surrendered the premises. Thereafter the Lessor leased the premises at a much lower rental to a new tenant. The truth is,—that instead of profiting by the bankruptcy of the Lessee, the Lessor sustained considerable loss.

The landlord has the right to safeguard his interests. We submit that he can lease his property or not as he sees fit, and on such terms as he may impose. He can exact a bonus or consideration for the execution of a lease, or he can charge any rental, whether the same be exorbitant or inadequate, and if the Lessee accepts his terms, such contract is binding. Owing to just such situation as resulted from the bankruptcy of the Sun Drug Co., owners of valuable property attempt to protect themselves against loss. To this end various methods are used in drawing leases. Some require an amount to be paid as consideration for the execution of the lease. Others require several times the actual rental value for the first month or so. In all cases credit is given the Lessee, generally,—by making the rental of the last several months of the term $1.00 (Pilchard Motor Case) or rent free (Dutton v. Christie), and sometimes the money is absorbed by spreading the credit over the entire term.

In conclusion we beg to submit that the order of Judge Bean of the District Court should be affirmed.

Respectfully submitted,

BRICE & BRAZELL,
Attorneys for Respondent.

No. 4359

United States

Circuit Court of Appeals

For the Ninth Circuit. 4

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government,

Appellant,

vs.

TAYOKICHI YAMADA,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

The Filmer Bros. Electrotype Co., San Francisco—11—5—24—60

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Attorney for Appellee. [1*]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Application of TAYOKICHI YAMADA for a Writ of Habeas Corpus.

PETITION.

The petition of Tayokichi Yamada, a Japanese alien now residing at Seattle, within the said Division and District, respectfully shows to the Court:

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*Page-number appearing at foot of page of original certified Transcript of Record.

I.

That he is a citizen and subject of the Empire of Japan, of the age of 37 years; that on or about September 10th, 1902, he was lawfully admitted to the United States of America and ever since said date has been lawfully domiciled in the United States of America, and for upwards of ten years last past has been an actual *bona fide* resident of the city of Seattle, county of King, State of Washington.

II.

That your petitioner is now imprisoned, detained and restrained of his liberty by Luther Weedin, United States Commissioner of Immigration, and his officers, deputies and assistants, at the port of Seattle, State of Washington; that he is not committed or detained by virtue of a final judgment and decree of any competent tribunal of civil or criminal jurisdiction, or by virtue of an execution issued upon any such judgment or decree; that the sole cause or pretense of such confinement, imprisonment and restraint, according to the knowledge and belief of your petitioner, is that said commissioner, his officers, deputies and assistants above named claim arbitrarily and capriciously the right to deport your [2] petitioner from the United States and return him to the Empire of Japan, by reason of the fact that your petitioner while lawfully in the United States was on the 2d day of February, 1907, by a judgment made and entered in the Superior Court of the State of Washington for the county of King, adjudged guilty of the crime of assault with a deadly weapon, and sen-

tenced by said Court to confinement in the penitentiary of the State of Washington at Walla Walla therein for a period of two years.

III.

That your petitioner was paroled from the said state penitentiary on May 1, 1908, and immediately thereafter resumed his residence in the City of Seattle, State of Washington, where he continued to reside until about the month of September, 1913, when he made a trip to Japan for the purpose of visiting his aged parents, domiciled therein; that in making said trip petitioner did not intend to abandon his residence and domicile in the United States, but embarked upon said trip with the firm and express intention of returning to the United States after making a short visit to his parents as aforesaid; that he again returned to the United States on May 21st, 1914, bearing a lawful passport from the Imperial Consul of Japan, and was admitted at the port of Seattle on the 21st day of May, 1914, as a "nonimmigrant" and ever since said last mentioned date has continued to reside in the said city of Seattle, State of Washington; that he has never been convicted of any other crime or offense save the one herein mentioned and set forth.

IV.

That your petitioner has appealed to the Secretary of Labor at Washington, D. C., for his discharge and for permission to remain in the United States on the grounds set forth in this application for a writ of habeas corpus; that your petitioner's

[3] appeal to the said secretary has been denied and that pursuant to the order of deportation issued upon said warrant by the United States Immigration authorities your petitioner will be deported by said Commissioner of Immigration and his subordinate officers, inspectors and assistants at the port of Seattle unless your petitioner be released and discharged upon this application for the said writ of habeas corpus; that pending the return of an order to show cause why the writ should not issue, your petitioner is liable to deportation unless said commissioner, his officers, deputies and assistants are restrained and enjoined from deporting your petitioner and from placing or attempting to place him on board ship for that purpose.

V.

That by reason of the premises, as herein set out, your petitioner alleges that his arrest, detention and imprisonment is illegal and without authority of law and that a writ of habeas corpus should issue and your petitioner be released and discharged from custody.

WHEREFORE your petitioner prays:

1. That a writ of habeas corpus be issued by this Hororable Court, directed to the said Luther Weedin Commissioner of Immigration, both of Seattle, within said Division and District and that upon the return of said writ and hearing thereon your petitioner be discharged from custody and from the said illegal restraint and unlawful arrest.

2. That an order to show cause be issued forthwith directed to the said Luther Weedin, Commis-

sioner of Immigration, and his officers, deputies and assistants, directing them to be and appear in the above-entitled court at a time to be fixed by [4] this Honorable Court to show cause, if any there be, why the writ of habeas corpus prayed for in this petition should not issue in accordance with the prayer of said petition.

3. That pending a hearing upon the application for this writ of habeas corpus the said Luther Weedin and the United States Immigration Inspector, officers and assistants under his authority, be restrained and enjoined from deporting your petioner from Seattle, Washington, to the Empire of Japan or to any other place in the world, and from removing your petitioner from the jurisdiction of this Court.

And your petitioner will ever pray.

M. J. GORDON,
TENNANT & CARMODY,
Attorneys for Petitioner. [5]

United States of America,
Western District of Washington,
Northern Division,—ss.

Tayokichi Yamada, being first duly sworn on oath, deposes and says: That he has read the foregoing petitnon for a writ of habeas corpus, knows the contents thereof and that the statements therein contained are true.

TAYOKICHI YAMADA.

Subscribed and sworn to before me this 16 day of June, 1924.

[Seal] GEO. R. TENNANT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court for the Western District of Washington, Northern Division. Jun. 16, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Application of TAYOKICHI YAMADA, for a Writ of Habeas Corpus.

ORDER TO SHOW CAUSE AND RESTRAINING ORDER.

This cause coming on to be heard upon the application of the petitioner herein for a writ of habeas corpus, and the Court having read the petition and being fully advised in the premises:

IT IS BY THE COURT ORDERED that Luther Weedin, Commissioner of Immigration at the Port of Seattle, together with divers and sundry the immigration officers, inspectors and officials at the Port of Seattle, acting under the authority of the United States and of said Luther Weedin at the Port of Seattle aforesaid, be and they and each

of them hereby are required to be and appear in the courtroom of the United States District Court at Seattle, Washington, in the Postoffice Building, on the 23d day of June, 1924, at 10 o'clock in the forenoon of said day, then and there to show cause, if any there be, why the writ of habeas corpus prayed for in the petition filed herein should not issue in accordance with the prayer of the said petition.

IT IS FURTHER ORDERED that the above-named Luther Weedin, Commissioner of Immigration of the United States at the Port of Seattle aforesaid, together with his assistants, deputies, inspectors, employees in the Immigration Service of the United States at Seattle aforesaid be, and each of them hereby is enjoined and restrained from removing the petitioner in the above-entitled cause, to wit, one Tayokichi Yamada, from the City of Seattle, and from and out of the jurisdiction of this [7] Court in the above division and district, provided a deposit of Fifty Dollars be made with Luther Weedin, Commissioner, to guarantee the expense of petitioner's maintenance pending this hearing, and from deporting beyond or overseas from the Port of Seattle, the said petitioner in this said cause.

Done in open court this 16 day of June, 1924.

JEREMIAH NETERER,
United States District Judge.

Form No. 282.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed order to show cause and restraining order on the therein named Luther Weedin, Commissioner of Immigration, personally at Seattle in King County, State of Washington, by handing to and leaving a true and correct copy thereof with Luther Weedin Commissioner of Immigration, personally at Seattle, in said District on the 16th day of June, A. D. 1924.

E. B. BENN,
U. S. Marshal.
By A. B. McDONALD,
Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 16, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Application of TAYOHICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable District Court of the United States, for the Western District of Washington, Northern Division:

Now comes the respondent, Luther Weedin, United States Commissioner of Immigration for the District of Washington, with his office at the Port of Seattle, and for answer and return to the order to show cause entered herein, says that at the time of the service of order to show cause and of the petition herein upon him, the said respondent, the said Tayohichi Yamada, *alias* H. Yamada, was in the custody of this respondent, and held for deportation from the United States as an alien person subject to deportation, having been convicted of a felony or other crime or misdemeanor involving moral turpitude, prior to his entry into the United States, in violation of the Immigration Act of February 5, 1917; that the said Tayohichi Yamada, *alias* H. Yamada, was arrested under a warrant of arrest issued by the Secretary of Labor on the 19th day of February, 1924, and thereafter, given a hearing before an Immigrant Inspector on the 18th day of March, 1924; that as a result of the said hearing, the Immigrant Inspector made findings on April 22, 1924, said findings being that the said Tayohichi Yamada, *alias* H. Yamada, is an alien, a native of Japan, who entered the United States at the Port of Seattle, May 21, 1914; that he has been convicted of, and admits the [9] commission of a

felony, or other crime or misdemeanor involving moral turpitude, prior to his entry into the United States, to wit: assault with a deadly weapon; that as a result of said hearing the said Immigrant Inspector recommended deportation; thereafter an appeal was taken to the Secretary of Labor, and on the 12th day of May, 1924, the Secretary of Labor issued a warrant directing the deportation of the said Tayohichi Yamada, *alias* H. Yamada.

Respondent hereto attaches a copy of the record, order, decision and exhibits, both on the hearing before the Immigration Inspector at Seattle, Washington, on March 18, 1924, and the record of the submission of said hearing to the Secretary of Labor, which papers are hereby made a part and parcel of this return, the same as if copied herein in full. Respondent denies every allegation in the petition herein, except as heretofore expressly admitted.

WHEREFORE, respondent prays that the said writ of Habeas Corpus be denied.

LUTHER WEEDIN,
Commissioner of Immigration.

United States of America,
Western District of Washington,
Northern Division,—ss.

Luther Weedin, being first duly sworn, on oath states: That he is United States Commissioner of Immigration for the District of Washington; that he has read the foregoing return, knows the contents thereof, and believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 27th day of June, 1924.

[Seal] D. L. YOUNG,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. June 27, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [10]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Application of TAYOKICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

TRAVERSE AND REPLY.

Comes now the petitioner and for reply to the return filed and entered herein by the respondent to the order to show cause why a writ of habeas corpus should not issue as prayed, and alleges:

I.

Your petitioner denies that he has been convicted of any crime or misdemeanor involving moral turpitude prior to his entry into the United States or at all.

WHEREFORE he prays judgment as in his petition is prayed.

T. YAMADA,
Petitioner.

United States of America,
Western District of Washington,
Northern Division,—ss.

Tayokichi Yamada, being duly sworn on oath, states: That he is the petitioner for the writ of habeas corpus in the above-entitled action; that he has read the foregoing reply and traverse, knows the contents thereof and believes the same to be true.

TAYOKICHI YAMADA.

Subscribed and sworn to before me this 27th day of June, 1924.

[Seal] GEO. R. TENNANT,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 27, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [11]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Application of TAYOHICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

DECISION.

Filed June 30, 1924.

The petitioner, by writ of habeas corpus, seeks discharge from a warrant of deportation on the ground that he was not granted a fair hearing and that there is no warrant of law to support deportation.

The petitioner lawfully entered the United States in 1902. In 1907 he was indicted and pleaded guilty to the crime of assault with a deadly weapon and was committed to the State penitentiary for a term of two years. In 1913 he departed on a visit to Japan and returned in 1914 on a passport describing him as a returning immigrant, and has resided in the City of Seattle continuously since re-entry. Pursuant to warrant of arrest issued by the Secretary of Labor, February 19, 1924, he was arrested and after hearing and appeal to the Secretary of Labor, was ordered deported on the ground

> "That he has been convicted of, and admits the commission of a felony, or other crime or misdemeanor involving moral turpitude, prior to his entry into the United States, to wit, assault with a deadly weapon."

M. J. GORDON, TENNANT & CARMODY, Attorneys for Petitioner.

MATTHEW W. HILL, Asst. U. S. Attorney, Attorney for United States.

NETERER, District Judge:

The petitioner invokes the five years after entry

limitation specified by Sec. 19, Act of 1917. The "Immigration Act" of 1924 took effect May 26, 1924, and has no application. The Government contends that the conviction of the alien in 1907 in the United States subjected him to deportation under the Act of 1917 at any time, and cites Lauria vs. U. S., 271 Fed. 261; U. S. ex rel. David vs. Todd, 289 Fed. 60, and Hughes vs. Tropele, 296 Fed. 306.

Lauria first entered the United States Dec. 27, 1914. He was arrested on deportation warrant Dec. 19, 1919, and warrant of deportation was issued May 5, 1920. The effective date involved is conclusive that deportation proceedings were commenced within five years from the date of entry. The Court did say at page 263:

> "We think Congress intended to pronounce classes of aliens who are undesirable and by general provisions of law exclude all within five years, but provided specifically that certain classes, including the class to which the appellant belongs, might be taken into custody and deported at any time."

In U. S. ex. rel. Davis vs. Todd, *supra,* the court held it sufficient if deportation proceedings are instituted within five years. [12]

The issue in the instant case is distinguished from that in the Lauria case in that this proceeding was not instituted within five years from date of entry. The court in the Lauria case is right in saying that the Congress intended to classify the aliens and to limit deportation to the particular classes, and that

Lauria was within the provisions of the act, but the language of the court is *obiter dictum* in saying that a person convicted of a crime involving moral turpitude prior to entry can be deported under the Act of 1917 *at any time.* Section 19 deals with two classes of aliens; the first is those who have no right to enter; the second class, those whose admission was lawful but whose subsequent conduct forfeited the right to remain. The five year limitation of the first class began at the date of entry and the five year limitation period of the second class began at the time of the commission of, or conviction of the inhibited crime. This is the view expressed by the Court of Appeals of the Third Circuit in Hughes vs. Tropele, *supra.* The petitioner is of the first class. Thus concluding, it is unnecessary to discuss whether the conviction involved moral turpitude. *Inter alia,* it may be said, however, that this court on May 25, 1922, in re Eli Rousseau, affirmed 284 Fed. 565, held that a person convicted under the state statute of the crime of being a "jointist" and sentenced to the penitentiary, was convicted of a crime involving moral turpitude.

The writ will be granted.

NETERER,
U. S. District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 30, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [13]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Application of TAYOKICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

ORDER GRANTING WRIT OF HABEAS CORPUS.

In the above-entitled cause, the petitioner having on June 16, 1924, filed his petition for a writ of habeas corpus alleging that he was illegally detained and incarcerated by Luther Weedin, United States Commissioner of Immigration, at the port of Seattle, and the Court having made and entered an order herein requiring the said Luther Weedin to show cause before this Court why a writ of habeas corpus should not be granted to said petitioner upon the said petition, and the said Luther Weedin, as Commissioner as aforesaid, having made his return thereto, and the matter having come on to be heard on the 27th day of June, 1924, and the Court having on the 30th day of June, 1924, filed a decision herein holding, finding and deciding that the detention of the petitioner for deportation was unjustified and without warrant of law.

NOW, THEREFORE, it is by the Court ordered and considered, and the Court does hereby order and consider that a writ of habeas corpus is awarded and granted to the petitioner herein, and that said

writ do issue to Luther Weedin, Commissioner as aforesaid, commanding him to produce the body of Tayokichi Yamada before this Court on the 3d day of July, 1924, at 10 o'clock A. M., then and there to submit to such order as may be made by the Court herein.

Done in open court this 2d day of July, 1924.

WM. H. SAWTELLE,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 2, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [14]

United States District Court, Western District of Washington.

No. 8623.

WRIT OF HABEAS CORPUS.

The President of the United States of America: to Luther Weedin, Commissioner of Immigration, Seattle, Washington, GREETING:

WE COMMAND YOU, that you have the body of Tayokichi Yamada, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name said Tayokichi Yamada, shall be called or charged, before the Hon. William H. Sawtelle, United States District Judge for the Western District of Washington, at the courtroom of said court, in the City of Seattle, in the Northern Division of

said Western District of Washington, on the 3d day of July, A. D. 1924, at 10 o'clock in the forenoon, to do and receive what shall then and there be considered concerning him the said Tayokichi Yamada, and have you then and there this writ.

WITNESS the Hon. WILLIAM H. SAWTELLE, Judge of the United States District Court for the Western District of Washington, this 2d day of July, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] F. M. HARSHBERGER,
Clerk.
By S. M. H. Cook,
Deputy Clerk.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 2d, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Wash.,—ss.

I hereby certify and return that I served the annexed writ of habeas corpus on the therein named Luther Weedin, by handing to and leaving a true and correct copy thereof with him, personally, at Seattle, Wash., in said District, on the 2d day of July, A. D. 1924.

E. B. BENN,
U. S. Marshal.
By Joseph Knizek,
Deputy. [15]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Application of TAYOHICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

RETURN TO WRIT OF HABEAS CORPUS.

To the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington:

Comes now Luther Weedin, United States Commissioner of Immigration at Seattle, Washington, and for return to the writ of habeas corpus heretofore served upon him, herewith produces in the court the body of Tayohichi Yamada, *alias* H. Yamada, and shows and certifies to this Court:

That the statement of facts in the return to the order to show cause, heretofore filed herein, is true and correct, and by reference thereto, is made a part of this return, the same as though set forth in full.

WHEREFORE, having made a full and complete return and certificate as to the manner and authority by which the said Tayohichi Yamada, *alias* H. Yamada, is held, Luther Weedin, United States Commissioner of Immigration, who makes this return prays this Court for an order quashing the writ of habeas corpus heretofore entered.

LUTHER WEEDIN,
United States Commissioner of Immigration.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 26, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Application of TAYOKICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

ORDER DISCHARGING PETITIONER.

In the above-entitled cause, the petitioner having on June 16, 1924, filed his petition for a writ of habeas corpus alleging that he was illegally detained and incarcerated by Luther Weedin, United States Commissioner of Immigration, at the Port of Seattle, and the Court having made and entered an order herein requiring the said Luther Weedin, as Commissioner aforesaid, to show cause before this Court why a writ of habeas corpus should not be granted to said petitioner upon said petition, and the said Luther Weedin, Commissioner as aforesaid, having made his return thereto and the matter having come on for hearing on the 27th day of June, 1924, before the Honorable Jeremiah Neterer, Judge of the above-entitled court, and the said Judge having on the 30th day of June, 1924, filed a memorandum decision herein holding, finding and

deciding that the detention of the petitioner for deportation by the said Luther Weedin, Commissioner as aforesaid, was unjustified and without warrant of law and granting the writ of habeas corpus, and the Honorable William H. Sawtelle, sitting as Judge of the above-entitled court, having on July 2, 1924, made an order directing that a writ of habeas corpus be issued herein to the said Luther Weedin, Commissioner as aforesaid, commanding him to produce the body of said Tayokichi Yamada before this Court on the 3d day of July, 1924, at 10 o'clock A. M. and on the said 3d day of July, 1924, the said Luther Weedin, Commissioner as aforesaid, having produced the body of said Tayokichi Yamada in obedience to said writ of habeas corpus and no other or [17] further cause for his detention occurring except as disclosed in the return of said Commissioner of Immigration to the said writ of habeas corpus, and the said Honorable William H. Sawtelle, sitting as aforesaid, having released the petitioner on Five Hundred ($500.00) Dollars cash bail pending further proceedings herein, but refusing to sign the final order discharging the petitioner for the reason that the matter was not heard before him or decided by him, and the said petitioner having on the 3d day of July, 1924, deposited with the Clerk of the above-entitled court Five Hundred ($500.00) Dollars cash as bail, together with his recognizance for his appearance before the Court,

NOW, THEREFORE, IT IS HEREBY ORDERED AND ADJUDGED BY THE COURT

that unless within five days the United States appeals from this order, the said Tayokichi Yamada be discharged and that he go hence without day.

Done in open court this 23d day of September, 1924.

JEREMIAH NETERER,
Judge.

O. K.—THOS. P. REVELLE,
U. S. Attorney,
DONALD G. GRAHAM,
Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 23, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Petition of TAYOKICHI YAMADA, *alias* H. YAMADA, for writ of Habeas Corpus.

PETITION FOR APPEAL.

Luther Weedin, United States Commissioner of Immigration at the port of Seattle, the respondent above named, deeming himself aggrieved by the order and judgment entered herein on the 23d day of September, 1924, does hereby appeal from the

said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript and record of proceedings and papers upon which said order and judgment is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

THOS. P. REVELLE,
United States Attorney for the Western District of Washington,
By DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for Appellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 26, 1924. F. M. Harshberger, Deputy. [19]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Petition of TAYOKICHI YAMADA, *alias* H. YAMADA, for Writ of Habeas Corpus.

NOTICE OF APPEAL.

To Tayokichi Yamada, *alias* H. Yamada, and to M. J. Gordon & Tennant & Carmody, Attorneys for Tayokichi Yamada, *alias* H. Yamada:

You, and each of you, are hereby notified that

Luther Weedin, as United States Commissioner of Immigration at the port of Seattle, respondent above named, hereby and now appeals from that certain order, judgment and decree made herein by the above-entitled court on the 23d day of September, 1924, adjudging, holding, finding and decreeing that the above-named petitioner for writ of habeas corpus, Tayokichi Yamada, *alias* H. Yamada, be discharged from the custody of said United States Commissioner of Immigration and from the whole thereof, to the United States Circuit Court of Appeals for the Ninth Circuit.

THOS. P. REVELLE,
United States Attorney for the Western District of Washington,

By DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for Luther Weedin, United States Commissioner of Immigration for the Port of Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 26, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Petition of TAYOKICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

ORDER ALLOWING APPEAL AND FIXING BOND OF PETITIONER.

Now, to wit, on the 26th day of September, 1924, IT IS ORDERED that the appeal be allowed as prayed for, and

IT IS FURTHER ORDERED that the petitioner for writ of habeas corpus may remain at large pending said appeal, upon executing a recognizance or bond to the United States of America, to the satisfaction of the clerk of this court, in the sum of Five Hundred Dollars, cash, which is now on deposit with the clerk, for the appearance of said petitioner to answer the judgment of the Circuit Court of Appeals, if the judgment of the District Court shall be reversed.

Done in open court this 26th day of September, 1924.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 23, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Application of TOYOKICHI YAMADA, *alias* H. YAMADA, for Writ of Habeas Corpus.

ASSIGNMENTS OF ERROR.

Comes now Luther Weedin, United States Commissioner of Immigration at the Port of Seattle, Washington, and assigns error in the decision of the said District Court of Washington as follows:

I.

The Court erred in holding that deportation proceedings were not commenced within the time allowed by statute.

II.

The Court erred in holding and deciding that a writ of habeas corpus be awarded the petitioner herein.

III.

The Court erred in holding, deciding and adjudging that the petitioner be discharged from the custody of Luther Weedin as Commissioner of Immigration at the port of Seattle, Washington.

IV.

The Court erred in deciding, holding and adjudging that the petitioner was not subject to deporta-

tion but was entitled to remain in the United States and was entitled to be at large.

THOS. P. REVELLE,
United States Attorney for the Western District of Washington,

DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for the Appellant, Luther Weedin, United States Commissioner of Immigration, at the Port of Seattle, Washington.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 23, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Petition of TAYOKICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

STIPULATION.

IT IS HEREBY STIPULATED and agreed by and between M. J. Gordon & Geo. Tennant, Esquires, attorneys for Tayokichi Yamada, *alias* H. Yamada, appellee, and Thomas P. Revelle and Donald G. Graham, United States Attorney and Assistant United States Attorney, respectively, as attorneys for Luther Weedin, Commissioner of Im-

migration, appellant, that the original file and record of the Department of Labor covering the deportation proceedings against the petitioner which was filed with the respondent's return in the above-entitled cause may be by the Clerk of this Court sent up to the Clerk of the Circuit Court of Appeals as part of the appellate record in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record and file and that said original records may be transmitted as part of the appellate record.

THOS. P. REVELLE,
United States Attorney,
DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for Appellant.
M. J. GORDON,
GEO. R. TENNANT,
Attorneys for Appellee.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 26, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Petition of TAYOKICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

ORDER FOR TRANSMISSION OF ORIGINAL RECORD.

Upon stipulation of counsel, it is by the Court ORDERED, and the Court does hereby order, that the Clerk of the above-entitled court transmit with the appellate record in said cause the original file and record of the Department of Labor, covering the deportation proceedings against the petitioner, which was filed with the respondent's return in the above cause, directly to the Clerk of the Circuit Court of Appeals, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record.

Done in open court this 2d day of October, 1924.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 2, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [24]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Petition of TAYOKICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

PRAECIPE OF APPELLANT FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

You will please prepare and duly authenticate the transcript and following portions of the record in the above-entitled case for appeal of the said appellant, heretofore allowed, to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Restraining order.
4. Return to order to show cause.
5. Traverse and reply of petitioner to return.
6. Decision of Honorable Jeremiah Neterer.
7. Order granting writ of habeas corpus.
8. Writ of habeas corpus.
9. Order discharging petitioner.
10. Petition for appeal.
11. Notice of appeal.
12. Order allowing appeal and fixing bond of petitioner.
13. Assignments of error.
14. Citation.
15. Return to writ of habeas corpus. [25]
16. Stipulation allowing original file and record of the Department of Labor to be sent to the Clerk of the Circuit Court of Appeals as part of the appellate record.

17. Order for transmission of original file and record.
18. This praecipe.

THOS. P. REVELLE,
United States Attorney,
DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for Appellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 1, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Application of TAYOKICHI YAMADA, for a Writ of Habeas Corpus.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 26, inclusive, to be a full, true, correct and complete copy of so much of the record, papers,

and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitute the record on appeal herein, from the judgment of the said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the appellant, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [27]

Clerk's fees (Sec. 828, R. S. U. S.) for making record, certificate or return, 58 folios at 15¢	$8.70
Certificate of Clerk to transcript of record, 4 folios at 15¢	.60
Seal to said certificate	.20
Certificate of Clerk to original exhibits, 2 folios at 15¢	.30
Seal to said certificate	.20

I hereby certify that the above cost for preparing and certifying record, amounting to $10.00, will be included as constructive charges against the United States in my quarterly account to the Government of fees and emoluments for the quarter ending December 31, 1924.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court,

at Seattle, in said District, this 11th day of October, 1924.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [28]

United States District Court, Western District of Washington, Northern Division.

No. 8623.

In the Matter of the Petition of TAYOKICHI YAMADA, *alias* H. YAMADA, for a Writ of Habeas Corpus.

CITATION.

The United States of America,—ss.

To Tayokichi Yamada, *alias* H. Yamada, GREETING:

WHEREAS, Luther Weedin, United States Commissioner of Immigration at the Port of Seattle, Washington, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, order and decree lately on, to wit, the 23d day of September, 1924, rendered in the District Court of the United States for the Western District of Washington, made in favor of you, adjudging and decreeing that Tayokichi Yamada, *alias* H. Yamada, be discharged from the custody of said Luther Weedin as United States Commissioner of Immigration at the Port of Seattle, Washington, and setting him at large;

YOU ARE THEREFORE CITED to appear before the United States Circuit Court of Appeals, in the City of San Francisco, State of California, on the 26th day of October next, to do and receive what may obtain to justice to be done in the premises.

GIVEN under my hand in the City of Seattle, in the Ninth Circuit, this 26th day of September, in the year of our Lord, nineteen hundred twenty-four, and the Independence of the United States the one hundred forty-eighth.

[Seal] JEREMIAH NETERER,
Judge of the U. S. District Court for the Western District of Washington.

Rec'd copy hereof this 26th day of Sept., 1924.

M. J. GORDON and
TENNANT & CARMODY,
Attys. for Appellee.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 26, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

[Endorsed]: No. 4359. United States Circuit Court of Appeals for the Ninth Circuit. Luther Weedin, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government, Appellant, vs. Tayokichi Yamada, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the

Western District of Washington, Northern Division.

Filed October 14, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4359

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, *Appellant*

vs.

TAYOKICHI YAMADA, *Appellee*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellant

THOS. P. REVELLE
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In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4359

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, *Appellant*

vs.

TAYOKICHI YAMADA, *Appellee*

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JEREMIAH NETERER, JUDGE

Brief of Appellant

STATEMENT OF THE CASE

Tayokichi Yamada is an alien, a native and subject of Japan, of the Japanese race, thirty-seven years of age. He first entered the United States in 1902 and resided here until 1913. He then made

a trip to Japan where he resided one year, again entering the United States at Seattle, Washington, on May 21, 1914, under a passport describing him as a returned immigrant, and has lived in Seattle, Washington, at all times since his return.

On February 2, 1907, at Seattle, Washington, Yamada pleaded guilty to the crime of assault with a deadly weapon, and was sentenced to imprisonment for two years, at hard labor, in the Washington State Penitentiary at Walla Walla, Washington. Certified copy of judgment and sentence, as contained in the record herein, states that the defendant, Yamada, had been informed against for the crime of assault with intent to commit murder, on the first day of December, 1906, of his plea of not guilty to the offense charged in the information, of his withdrawal of said plea and of his entering a plea of guilty to assault with a deadly weapon, which plea the court granted.

Pursuant to warrant of arrest issued by the Secretary of Labor February 19, 1924, Yamada was arrested, and after a hearing and appeal to the Secretary of Labor, was ordered deported on the ground, "That he has been convicted of and admits the commission of a felony, or other crime

or misdemeanor involving moral turpitude, prior to his entry into the United States, to-wit: assault with a deadly weapon."

The alien refused to testify at the hearing, other than to admit his entry into the United States in 1902, and also in 1914, and he further admitted that he had been convicted of the crime of assault with a deadly weapon on February 2, 1907, and had been sentenced to imprisonment for two years in the Washington State Penitentiary.

After an oral argument and submission of written briefs, upon an order to show cause why a writ of habeas corpus should not issue, the United States District Court, Western District of Washington, Northern Division, by Judge Neterer, granted the writ, on the ground that Section 19 of the Immigration Act of 1917, imposes a five year limitation after entry upon the right of the Government to deport an alien after the commission of a felony or other crime or misdeameanor, involving moral turpitude. Subsequently, an order was entered discharging the alien, and from this order proceedings to perfect appeal have been duly instituted by the Commissioner of Immigration.

ASSIGNMENTS OF ERROR

I

The Court erred in holding that deportation proceedings were not commenced within the time allowed by statute.

II

The Court erred in holding and deciding that a writ of habeas corpus be awarded the petitioner herein.

III

The Court erred in holding, deciding and adjudging that the petitioner be discharged from the custody of Luther Weedin as Commissioner of Immigration at the Port of Seattle, Washington.

IV

The Court erred in deciding, holding and adjudging that the petitioner was not subject to deportation but was entitled to remain in the United States and was entitled to be at large.

ARGUMENT

The Lower Court Misconstrued Section 19 of the Immigration Act of 1917, in Holding That There Is a Five Year After Entry Limitation Upon the Right to Deport

It has always been considered by the Bureau of Immigration that deportation under Section 19, for conviction, or the admission of the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude, may be had irrespective of the time of entry. See page 30 of Analysis of Immigration Laws, issued by United States Department of Labor, 1924. As will be subsequently pointed out, this construction is amply supported by the authorities.

Section 19 of the Immigration Act of February 5, 1917, sets out numerous grounds under which an alien may be deported from the United States after entry. For some of the grounds a time limitation is imposed, limiting the right of the Government to deport an alien within a certain period, dating from his last entry. A summary of the grounds follows:

1. At any time within five years after entry, an alien who at the time of his entry was the member of one or more of the classes excluded by law.

2. An alien who shall have entered, or who shall be found in the United States in violation of this act, or in violation of any other law of the United States. No time limitation.

3. An alien after entering found advocating or teaching unlawful destruction of property, or advocating or teaching anarchy or overthrow by force or violence of the Government of the United States, or all form of law, or assassination of public officials. No time limitation.

4. An alien who, within five years after entry, becomes a public charge, from conditions not affirmatively shown to have arisen subsequent to landing. No time limitation as to right to institute deportation proceedings.

5. An alien who is hereafter sentenced to imprisonment for a term of one year, or more, because of conviction in this country of a crime involving moral turpitude, committed within five years after entry, or who is hereafter sentenced more than once to such a term of imprisonment, because of conviction in this country of any crime involving moral

turpitude committed at any time after entry. No limitation upon right to institute deportation proceedings.

6. An alien found an inmate of, or connected with a house of prostitution, or one practicing prostitution after entering the United States, or one receiving a share in the earnings of a prostitute, or managing, or employed by, or in connection with a house of prostitution, or one importing, or attempting to import, persons for the purpose of prostitution. No limitation.

7. "Any alien who was convicted or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude." No time limitation.

8. An alient entering the United States by water or by land at a time or place other than is designated by immigration officials, or the Commissioner General of Immigration, or who enters without inspection. In this case deportation may be instituted only within three years after entry.

It will thus be seen that the District Court has read into the portion of Section 19, pertaining to deportation for the conviction or admitting the commission of a felony, or other crime or misde-

meanor involving moral turpitude, a time limitation which is not there. It would seem that the ordinary elementary principles of statutory construction precludes such a construction. The statute is so clear in omitting the time limitation feature as to this ground of deportation that the courts, except in one or two instances, have not been called upon to construe a claim of time limitation.

The only case in which this point was squarely raised is that of *Lauria v. United States*, 271 Fed. 261, (writ of certiorari denied).

In this case decided by the Circuit Court of Appeals, Second Circuit, on February 9, 1921, the alien, Lauria, first entered the United States on December 27, 1914. Prior to this time, on May 30, 1912, he had been denied the right of admission, for the reason that he had been convicted of a crime involving moral turpitude, to-wit: highway robbery, prior to his entry. Upon his entry in 1914, he falsely stated to the immigration officials that he was a resident of the United States, and thus gained his admittance. He was later taken into custody on a warrant of arrest dated December 10, 1919, signed by the Secretary of Labor. After a hearing he was ordered deported on May 5, 1920, on the ground that upon his own

admission, he was guilty of a crime involving moral turpitude, before his entry to this country. It was urged that the first three lines of Section 19 of the Immigration Act of 1917, provide for the deportation, within five years after entry, of any alien who at the time of his entry was a member of one or more of the classes excluded by law, and that the time limit for his deportation had expired. The Court, per Manton, Circut Judge, referring to Section 3 providing that "any alien who was convicted, or who admits the conviction, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude," shall be taken into custody and deported, stated:

"It will be observed that section 3 is a provision intended to exclude certain classes of undesirable aliens. Section 19, in the first three lines, provides in general terms for exclusion within five years, of any alien who, at the time of entry, was a member of one or more of the classes excluded by law. But the act then proceeds to state specifically what aliens are to be deported. From the general provision of the first three lines, the act specifically enumerated classes to be excluded, but provides amplification of the general provisions of the first three lines and reads: * * *

" 'Any alien who was convicted, or who admits the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude

* * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported.'

"Effect must be given to each provision of the act. The five-year limitation contained in section 19 is not exclusive, and the five-year limitation must give way to the particular provision of the act which extends the time during which deportation may be made by reason of the latter provision of the statute just referred to. Since it is provided by section 3 that certain classes, 'idiots, imbeciles, feeble-minded persons, epileptics, insane persons, * * * persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude,' shall be excluded from the United States, it is apparent that Congress intended, when it legislated as to this, in section 19 of the act, to extend the time for deportation to the specific cases mentioned beyond the five-year period. It is only by this construction of the statute, that due regard can be given to each provision of section 19. To so construe the act as to require the apprehension and taking into custody and deporting the emigrant prior to the five-year limitation, would be to disregard some of the provisions of section 19 and would lead to conclusions which would be dangerous to the public. We think Congress intended to pronounce classes of aliens who are undesirable and, by general provision of law, exclude all within five years, but provided specifically that certain classes, including the class to which the appellant belongs, might be taken into custody and deported at any time. Congress has the power to order the deportation of aliens who

are undesirable in the United States. Bugajewitz v. Adams, 228 U. S. 585, 33 Sup. Ct. 607, 57 L. Ed. 978."

Judge Neterer, in his opinion, attempts to distinguish the *Yamada* case from the *Lauria* case, on the ground that the portion of the court's holding in the *Lauria* case, pertaining to an absence of time limitation, is *obiter dictum.* It is true that in the *Lauria* case the proceedings instituted by the issuance of a warrant of arrest by the Secretary of Labor occurred a few days prior to the expiration of five years after date of entry. However, the holding was not *dictum* because a claim was made by Lauria that the *warrant of deportation* must come within the five-year period, and it was, therefore, necessary for the court to decide whether there was, in fact, a five-year limitation provided by statute. It is thus seen that we have a square holding in favor of the Government's contention.

Judge Neterer cited *Hughes v. Tropello,* 296 Fed. 306, a case cited by the Circuit Court of Appeals, Third Circuit, as a holding in accord with his construction of section 19. In this case the alien arrived at the Port of New York on November 12, 1915, and an order of exclusion was executed for deportation, on the ground that he was feeble-minded, and likely to become a public charge. He was

allowed to enter, however, upon giving a bond. On April 19, 1919, a warrant of arrest was issued, and he was taken into custody, on the ground that he was in the United States in violation of the Immigration Act of 1917, that he was feeble-minded at the time of his entry and that he was likely to become a public charge. After various hearings, an order of deportation was issued, dated April 5, 1921. A writ of *habeas corpus* was issued and the holding of the District Court was affirmed on appeal, the granting of discharge of the alien being based on the fact that the deportation was not affected within the five-year limitation prescribed by the Act of 1917. It was stated by the court:

"Referring to Section 19, it must be clear that inasmuch as this section embraces every possible case where deportation can be had, the five-year limit therein fixed must prevail, unless such limitation is removed by an exception specified therein; *and we find such exception embracing a large number of cases in Section 19.*" (Italics ours.)

In these words the court recognizes the fact that not all the classes specified in Section 19 are deportable under the five-year limitation. The grounds under which the deportation was claimed in the *Tropello* case are embraced within the first three lines of Section 19, and the five-year limitation, therefore, clearly applies.

Guiney v. Bonham, 261 Fed. 582, is a strong case supporting the right of the Government to deport this alien at any time after entry. In this case, Guiney, a native of British Columbia, entered the United States in February or March, 1913. In 1916 he became a member of the Industrial Workers of the World, and held various offices in that organization. On February 18, 1919, the Department of Labor issued its warrant of arrest, on the ground that he had been found advocating or teaching the unlawful destruction of property, and sought his deportation under Section 19 of the Immigration Act of 1917. His order of deportation was subsequently issued and writ of *habeas corpus* was refused, and the holding of the lower court was affirmed on appeal. The ground of the petition for a writ of *habeas corpus* was that the right of deportation, under Section 19, is barred for five years from date of entry. The court stated that it did not so read the statute.

"It is plainly the intention of the statute to provide for the deportation of any alien who (at any time after entry) shall be found advocating or teaching the unlawful destruction of property. The five-year limitation in the first clause of the statute is not to be read into the clause in which the appellant is ordered deported."

THE LAST ENTRY OF THE ALIEN IS THE ENTRY REFERRED TO IN SECTION 19 OF THE IMMIGRATION ACT OF 1917.

It may be claimed that the commission of a felony or other crime involving moral turpitude must have occurred prior to the alien's original entry into the United States. Such a contention is, of course, without merit since the last date of entry controls.

Woo Shing v. United States, 282 Fed. 498;
Sinis Calchi v. Thomas, 195 Fed. 701.

THE IMMIGRATION ACT OF 1917, SECTION 19, AUTHORIZES THE DEPORTATION OF ALIENS ENTERING BEFORE ITS PASSAGE.

It may be urged that the Act of 1917 is not retroactive, and that an alien entering before its passage cannot be deported under any of its provisions. This point has been raised a number of times and the courts have repeatedly held that the act allows deportation of any alien found in this country, irrespective of the date of his entry.

Lauria v. United States, supra;
United States v. Tod, 289 Fed. 60;
Hughes v. Tropello, 296 Fed. 306;
Akiro Oono v. United States, 267 Fed. 359.

THE CRIME WHICH YAMADA PLEADED GUILTY TO AND WHICH HE ADMITS THE COMMISSION OF WAS BOTH A FELONY AND A CRIME INVOLVING MORAL TURPITUDE, EITHER OF WHICH IS SUFFICIENT TO ALLOW DEPORTATION.

It will be noted that that portion of Section 19 under which deportation is predicated in this case refers to the conviction or admitting the commission, prior to entry, of a felony or other crime or misdemeanor involving moral turpitude. It is submitted that the existence of a felony is sufficient, without proving or showing that such felony was a crime involving moral turpitude.

Yamada in 1907 was informed against on the charge of assault with intent to commit murder. He was allowed to plead guilty to the crime of assault with a deadly weapon. This crime is contained in Section 2749, Remington & Ballinger's 1910 Code (State of Washington), Laws of 1869, page 203, paragraph 29.

"Assault with deadly weapon, etc.—To do bodily harm—An assault with a deadly weapon, instrument or other thing, with an intent to inflict upon the person of another a bodily injury where no considerable provocation appears, or where the circumstances of the assault show a wilful, malignant and

abandoned heart, shall subject the offender to imprisonment in the penitentiary not exceeding two years, or to a fine not exceeding Five Thousand ($5,000) Dollars, or to both such fine and imprisonment."

It will thus be seen that not only is the crime to which the defendant pleaded guilty a felony, since it is punished by imprisonment in the penitentiary, but that the defendant's offense was so grave that the court felt justified in imposing the full maximum punishment of two years in the penitentiary, as provided by statute.

The plain wording of Section 19 seems to allow deportation if a felony has been committed, without respect to its moral turpitude feature, this probably because Congress had in mind that the commission of a felony is an act involving moral turpitude, and added the additional words, allowing deportation for a crime other than a felony, or even a misdemeanor, provided, only, such other crime or misdemeanor involved moral turpitude.

If Your Honors should be of the opinion, however, that Section 19 requires that the crime not only be a felony, but also possess the feature of moral turpidtude, then it is submitted that such a requirement is fully answered in the instant case. The

words of the Washington statute defining the crime require, "an intent to inflict upon the person of another a bodily injury." It is difficult to perceive how such an act could be anything but an act involving moral turpitude, and further argument will not be devoted to this aspect of the case.

In the case of *Russeau v. Weedin*, a case decided by Your Honors on November 20, 1922, and contained in 284 Fed. 565, a writ of *habeas corpus* had been denied the appellant, who was ordered deported on the ground that he had been convicted of the crime of being a "jointist," and sentenced to the State Penitentiarly to serve at hard labor from one to five years. While at large pending his appeal to the Supreme Court of the state, he left the United States and went to Canada. After the affirmance of his conviction, he returned to the State of Washington, entering at the Port of Blaine, falsely claiming to be a citizen of the United States. One of the grounds of his deportation was that, prior to his entry, he had been convicted of a crime involving moral turpitude. The opinion of the court, per Gilbert, Circuit Judge, states:

"A 'jointist,' under the statute of Washington (Laws of 1917, p. 60, par. 11) is one who opens up and conducts a place 'for the unlawful sale of intoxicating liquor,' and the offense is declared to

be a felony punishable by imprisonment of not less than one year or more than five years. The only question before this court is whether or not the crime involves moral turpitude. We think that the court below properly ruled that it does. The name of the crime is itself expressive of the degraded nature of the place at which the unlawful sale of intoxicating liquor is carried on. It suggests a resort of ill repute, and we think it may be affirmed that any one who wilfully opens a place for conducting a business which is positively forbidden and made punishable by law as a felony is guilty of an offense which involves moral turpitude."

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,
DONALD G. GRAHAM,
Assistant United States Attorney.
Attorneys for Appellant.

No. 4359.

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington,

Appellant,

vs.

TAYOKICHI YAMADA,

Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, *Judge.*

Brief of Appellee

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THE IVY PRESS, SEATTLE

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HONORABLE JEREMIAH NETERER, *Judge.*

Brief of Appellee

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vs.

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Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division

HONORABLE JEREMIAH NETERER, *Judge.*

Brief of Appellee

STATEMENT OF THE CASE.

Tayokichi Yamada, a Japanese born in Japan and a subject of the Empire of Japan, lawfully entered the United States on or about September 10th, 1902. He lived continuously in the United States until February 2nd, 1907, on which date he pleaded guilty to the crime of assault with a deadly

weapon and was sentenced by the Superior Court of the State of Washington for King County to serve a term of two years in the Washington State Penitentiary.

On May 1, 1908, he was paroled from the said State Penitentiary, and immediately resumed his residence in the City of Seattle, where he continued to reside until about the month of September, 1913, when he made a trip to Japan for the express purpose of visiting his aged parents. When he made this trip to Japan, under the statute then in force, being the Act of February 5th, 1907, he could not have been deported for the commission of the aforementioned crime, because more than three years had elapsed from the date of his release from the Penitentiary. He returned to the United States on May 21, 1914, bearing a lawful passport from the Imperial Consul of Japan and was admitted at the Port of Seattle as a "non-immigrant." Ever since his return he has resided in the City of Seattle, has married and is the father of two children, native-born subjects of the United States.

On February 19th, 1924, a warrant of arrest was issued by the Secretary of Labor, under which Yamada was arrested, and after a hearing and appeal to the Secretary of Labor, was ordered deported

on the ground "that he has been convicted of and admits the commission of a felony, or other crime or misdemeanor involving moral turpitude prior to his entry into the United States, to-wit: Assault with a deadly weapon." His application for a writ of Habeas Corpus was granted and he was discharged by Judge Neterer, District Judge.

ARGUMENT.

In this case, the question as to whether or not the deportation proceeding must have been instituted within five years after the date of entry—or concluded within five years after said date—is not involved, for the reason that this proceeding was not instituted for ten years after the date of appellee's re-entry into the United States in 1914. Two questions are involved.

1. Does the appellee belong to one of the classes excluded by law under the provisions of Section 3 of the Act of February 5th, 1917?

2. Does the five-year limitation, provided in Section 19 of the Act of February 5th, 1917, apply to appellee?

We will discuss these questions in inverse order for the reason that the Government has discussed

them in that order in its brief.

Section 3 of the Act of February 5th, 1917, provides as follows:

> "The following classes of aliens shall be excluded from admission into the United States: * * * Persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude * *." Section 19 of the same Act provides as follows:
>
> "At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; * * * shall, upon the warrant of the Secretary of Labor, be taken into custody and deported * * *."

We insist that the case of *Hughes vs. Tropello*, 296 Federal, page 306, is conclusive of the question. In that case, the alien arrived at the Port of New York on November 12th, 1915, and, after examination, an order of exclusion was executed for his deportation on the ground that he was feeble-minded and likely to become a public charge. A little later, upon giving a bond, he was permitted to enter the United States and resided therein until on April 19th, 1919; a warrant of arrest was issued and he was taken into custody. On April 5th, 1921, he was ordered deported and a writ of Habeas Corpus was issued, upon the hearing of which he was discharged.

It will be seen that Tropello and Yamada, the

appellee, both come within the five-year limitation fixed in the first three lines of Section 19 of the Act of February 5th, 1917, for the reason that they both belonged to the classes excluded by law, so that the language of the Court in the *Tropello* case applies with equal force to the *Yamada* case.

In passing upon the right of the Government to deport an alien of the excluded classes, after the five-year limitation had expired, the Court said:

> "It would seem clear that where the right of exclusion exists, but the right is waived by the department for any reason, and the alien is allowed to enter the country, whatever the conditions imposed, the case at once is taken out of the procedure for exclusion and is governed by the procedure relating to the expulsion and deportation of an alien found in the United States contrary to law. To this last named class, the statute of limitations applies. Section 19 designates, both generally and particularly, the aliens in the United States who are subject to be taken into custody and deported, not only those who have entered, or are found in the country, in violation of that act, but in violation of any other law of the United States. This section does not undertake to prescribe the method of procedure, what hearing shall be had, if any, or before whom. The section is concerned only in designating the aliens who may be deported, and in fixing a time limit within which such deportation must be made. The effective words are:
>
> > 'That at any time within five years after entry, any alien (specifying the various classes unlawfully entering or found

in the United States) shall, upon a warrant of the Secretary of Labor, be taken into custody and deported.'

"It must be clear that, inasmuch as this section embraces every possible case where deportation can be had, the five-year limit therein fixed must prevail, unless such limitation is removed by an exception specified therein; and we find such exception embracing a large number of cases in section 19.

"To better understand the meaning and effect of certain words in Section 20 (section 4289¼k), which have caused some conflict of opinion as to the five year limitation, it becomes necessary to keep in mind that section 19 is dealing with two classes of aliens, whose status before the law is entirely different, but who together constitute all the deportable cases. *The first class embraces those who had no right to enter the country, who were not admissible under the law, who ought to have been excluded but who have entered the country, or are found therein, in violation of the law. The status of all this class is fixed, unalterably, as of the date of arrival at port.* The second class embraces those whose admission into the United States was lawful, against whose status, at that time, physically, mentally, or morally, the law could raise no objection, but whose subsequent conduct was such as to forfeit their right, under the law, to remain. The status of this class is fixed, not as of the date of arrival, but as of the date when the offense was committed, or the conditions were found to exist, which forfeited their right of residence." (The italics are ours.)

Yamada, belonging to the first class mentioned in the above case, his status is unalterably fixed as

of the date of his re-entry into the United States in 1914, and the proceeding, not having been instituted for ten years thereafter, the limitation runs.

Another case in point is *United States vs. Tod,* 289 Federal, page 60. In that case both aliens belonged to the classes excluded by law, and the question passed upon by the Court was whether it was sufficient if the deportation proceeding was begun within five years after the date of entry. In passing upon the question as to whether the five year limitation applied the Court said:

> "Both these aliens belonged to classes which must under section 19 be 'taken into custody and deported' within 'five years after entry.'"

Again we have appellee belonging to the same class as the aliens involved, and again we have a ruling that the five-year limitation applies to him.

This Court in the case of *Ono vs. United States,* 267 Federal, page 359, recognized that the five-year limitation applied to the excluded classes of aliens. Ono, a Japanese, an unskilled laborer, unlawfully entered the United States, deserting from a ship, upon which he was employed as a coal passer, on March 1st, 1915. Under the provisions of the Act of February 20th, 1907, he belonged to the classes excluded by law. In holding that the Government

had the right to deport Ono within five years after his entry, this Court said:

> "Belonging, as the appellant clearly did, to a class, to-wit, that of unskilled laborers, denied the right of entry into the United States by virtue of the Act of February 20, 1907, and the presidential proclamations promulgated under and pursuant thereto that have been set out, he was by the express provision of Section 19 of the Act of February 5, 1917, (39 Stat. 874, 889 [Comp. St. 1918, Comp. St. Ann. Supp. 1919, Sec. 4289¼jj]), subject to deportation at any time within five years from the time of his entry."

Yamada, belonging to one of the excluded classes, the limitation fixed by this Court in the *Ono* case applies to the instant case.

The Government cites and relies upon the cases of *Lauria vs. United States,* 271 Federal, page 261, and *Guiney vs. Bonham,* 261 Federal, page 582. In the *Lauria* case the alien, after having been once deported, re-entered the United States on December 27th, 1914. At that time, he was admittedly guilty of a felony involving moral turpitude. He was taken into custody on a warrant of arrest dated December 10th, 1919, and was ordered deported. The sole contention made by Lauria was that the deportation proceedings must have been concluded within five years after his re-entry into the United States. In passing upon that point, the Court said:

"To so construe the act as to require the apprehension and taking into custody and deporting the emigrant prior to the five year limitation, would be to disregard some of the provisions of section 19 and would lead to conclusions which would be dangerous to the public."

That was the only point before the Court and the only point necessary of decision. In distinguishing the *Lauria* case from the instant case Judge Neterer said:

"The issue in the instant case is distinguished from that in the *Lauria* case in that this proceeding was not instituted within five years from date of entry. The court in the *Lauria* case is right in saying that the Congress intended to classify the aliens and to limit deportation to the particular classes, and that Lauria was within the provision of the act; but the language of the Court is *obiter dictum* in saying that a person convicted of a crime involving moral turpitude prior to entry can be deported under the Act of 1917 *at any time.* Section 19 deals with two classes of aliens; the first is those who have no right to enter; the second class, those whose admission was lawful but whose subsequent conduct forfeited the right to remain. The five-year limitation of the first class began at the date of entry, and the five-year limitation period of the second class began at the time of the commission of, or conviction of the inhibited crime. This is the view expressed by the Court of Appeals of the Third Circuit in *Hughes vs. Tropello, supra.* The petitioner is of the first class."

Transcript pages 14-15.

We can add little to what Judge Neterer has said. Investigation discloses that, from the very beginning, the Congress have attached a period of limitation beyond which aliens can not be deported; first, one year, then two years, then three years and finally five years.

We submit that the construction of the Act of February 5th, 1917, in the *Lauria* case is strained, unjustifiable and unnecessary to the decision of the case. We believe that the Act in plain words says that an alien in the situation of the petitioner must be deported within five years after his entry.

The case of *Guiney vs. Bonham, supra,* is not in point. In that case the alien lawfully entered the United States, and thereafter by his conduct forfeited his right to remain, and was ordered deported. He, therefore, does not come within the same class as Yamada, because his status was not unalterably fixed at the date of his entry.

The Government claims the right to deport Yamada upon the ground that, prior to his entry into the United States, he had committed a crime involving moral turpitude. Because of that, the Government claims the right to deport him at any time, however far distant from the time of entry,

during which long period he may have been living a life of rectitude.

It must be admitted that, under the plain terms of the Act, if the alien committed a like crime against the laws of the United States, proceedings to deport him would have to be instituted within the limit of five years after the commission of the crime. Why should the Congress be inclined to treat with more indulgence or less severity an offense against its own sovereignty than a like offense committed against the laws of some foreign government? To so construe the Act would seem to convict the Congress of an absurdity.

We submit that the limitation fixed in the Immigration acts have twice run in Yamada's case. First, the three-year limitation applicable under the Act of 1907, which ran before Yamada temporarily left the United States in 1913; and second, since he re-entered the United States in 1914, a period of ten years elapsing before the beginning of the proceeding to deport.

WAS THE APPELLEE AT THE TIME OF HIS RE-ENTRY IN 1914 GUILTY OF THE COMMISSION OF A CRIME INVOLVING MORAL TURPITUDE?

Yamada admits that on February 2nd, 1907, he pleaded guilty to the charge of assault with a deadly weapon, and was sentenced to serve two years in Walla Walla. Our contention is that the commission of the crime of assault with a deadly weapon does not necessarily involve moral turpitude. The Government relies upon the case of *Russeau vs. Weedin,* 284 Federal, page 565, decided by Your Honors on November 20th, 1922. We believe that case to be in favor of our contention, and will discuss it later in the light of other decisions cited by us. A universally-accepted definition of moral turpitude is as follows:

> "Moral turpitude is defined to be an act of baseness, vileness or depravity in the private and social duties which a man owes to his fellow men or to society in general." 20 Amer. and Eng. Enc. Law, page 872.

We are unable to see any reason why Yamada should be deemed guilty of baseness, vileness, depravity, etc. Many circumstances may arise in the crime of which the petitioner was guilty which would take him outside of the above definition. Two men might, without any previous intent, engage in

an argument resulting in blows; and one might seize a stick or other weapon and inflict injuries on the other. It could hardly be said that, under such circumstances, he was guilty of moral turpitude.

As was said by the Supreme Court of Alabama, in the case of *Gillman vs. State,* 51 Southern, page 722:

> "A mere assault and battery case does not involve moral turpitude. Moral turpitude signifies an inherent quality of baseness, vileness, depravity. Assaults and batteries are frequently the result of transient ebullitions of passion, to which a high order of men are liable, and do not necessarily involve any inherent element of moral turpitude."

Again in *McCuen vs. Ludlum,* 17 New Jersey Law Reports, page 12, the Court said:

> "An assault and battery is a crime *malum in se,* the commission of which rarely involves moral turpitude."

In the case of *Pollock vs. State,* 101 South Western, page 231 (Texas), the Court said:

> "Fighting is not an offense under the laws of this State that involves moral turpitude."

We believe that the Supreme Court of the State of Washington in the case of *In Re Hopkins,* 54 Washington, page 569, uses the same line of reasoning that Your Honors did in the *Russeau* case, *supra.* In that case the Court said:

"These acts upon which the conviction of appellant was had in the Federal Court constitute a grave offense against the pension laws of the United States, punishable by a fine not exceeding $500, or by imprisonment for a term of not more than five years. *U. S. Rev. Stats.* Sec. 4746. The gravity of the offense is thus indicated, though it may be conceded this does not determine the question of its involving moral turpitude. That question, after all, must be determined from the inherent immoral nature of the act, rather than from the degree of punishment which the statute law imposes therefor, though the latter may be some indication of the public conscience relating thereto.

"Bouvier, in his Law Dictionary says: 'Everything done contrary to justice, honesty, modesty, or good morals is said to be done with turpitude;' while Anderson's Dictionary of the Law defines turpitude as, 'Doing a thing against good morals, honesty or justice; unlawful conduct; infamy.'

"The Supreme Court of Pennsylvania, in the case of *Beck vs. Stitzel,* 21 Pa. St. 522, 524, refers to moral turpitude in this language:

" 'This element of moral turpitude is necessarily adaptive; for it is itself defined by the state of public morals, and thus far fits the action to be at all times accommodated to the common sense of the community.'

"See, also, *Ex parte Mason,* 29 Ore. 18, 43 Pac. 651, 54 Am. St. 772; *In re Coffey,* 123 Cal. 522, 56 Pac. 448; *In re Kirby,* 10 S. D. 322, 39 L. R. A. 856; *Newell, Slander & Libel,* 98.

The punishment fixed by statute may indicate

the gravity of the crime of assault with a deadly weapon, but does not determine the question of its moral turpitude.

As has heretofore been said, many men of a high order may commit a crime in the heat of passion and could not be said to be guilty of moral turpitude. The element of moral turpitude must necessarily be adaptive; and we submit that the question of adaptability is the basis of the decision in the *Russeau* case, *supra*. Russeau was convicted of the crime of being a "jointist." Judge Gilbert in the opinion of the Court said:

> "The only question before this Court is whether or not the crime involves moral turpitude. We think that the Court below properly ruled that it does. The name of the crime is itself expressive of the degraded nature of the place at which the unlawful sale of intoxicating liquor is carried on. It suggests a resort of ill repute, and we think it may be affirmed that any one who wilfully opens a place for conducting a business which is positively forbidden and made punishable by law as a felony is guilty of an offense which involves moral turpitude."

It could hardly be successfully contended that a person who deliberately opened up a "joint" for the unlawful sale of intoxicating liquor could do so without being guilty of moral turpitude. Your Honors properly decided that the inherent immoral

nature of the offense was sufficient to constitute turpitude.

But the same cannot be said of assault with a deadly weapon. Manslaughter is a serious offense, carrying a heavy penalty, but no one will contend that it necessarily involves moral turpitude.

The case of *United States vs. Uhl,* 210 Federal, page 860, is strictly in point. In that case the alien prior to entry into the United States was convicted of criminal libel in Great Britain, and the authorities of the United States refused to admit him and ordered him deported because of that fact. In passing upon the question as to whether the crime he had committed prior to entry involved moral turpitude the Court said:

> "*Third.* That the law must be administered upon broad general lines and if a crime does not in its essence involve moral turpitude, a person found guilty of such crime cannot be excluded because he is shown, *aliunde* the record, to be a depraved person.
>
> "*Fourth.* That the law must be uniformly administered. It would be manifestly unjust so to construe the statute as to exclude one person and admit another where both were convicted of criminal libel, because, in the opinion of the immigration officials, the testimony in the former case showed a more aggravated offense than in the latter.
>
> "*Fifth.* That the crime of publishing a

> criminal libel does not necessarily involve moral turpitude. It may do so, but moral turpitude is not of the essence of the crime."

From this case it appears that, while the crime of which the alien was guilty might involve moral turpitude, it did not necessarily do so; and that the Court was not justified in saying that it did. In other words, moral turpitude not being of the essence of the crime, the alien was entitled to enter.

We have found no authorities holding that moral turpitude is of the essence of the crime of which petitioner was guilty; and, in the absence of such authorities, we submit that the Court cannot assume that the crime in question involved moral turpitude. The Government seeking to deport him upon the ground that he was guilty at the time of entry of a crime involving moral turpitude, must assume the burden of proving to the Court that he was guilty of such a crime. In the absence of such proof, the Government is in no position to urge his deportation.

The Government has submitted no authorities to the effect that moral turpitude is of the essence of the crime of assault with a deadly weapon, for the very good reason that they could find none. Counsel seem to contend that, under the wording of

the Act, the mere conviction or admission of the commission of a felony prior to entry is sufficient to justify deportation. A mere reading of the applicable words in Section 3 of the Act of February 5th, 1917, shows the fallacy of this contention. Included among the classes of aliens excluded by that section from admission into the United States are "persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude." This language clearly means that any alien who was convicted of or admits the commission, prior to entry, of a felony, crime or misdemeanor involving moral turpitude shall be excluded; and, if improperly admitted, shall be deported under the terms of Section 19 of the Act. Otherwise the Congress would have used the word "any" instead of the word "other," making the clause read as follows: "Persons who have been convicted of or admit having committed a felony or *any* crime or misdemeanor involving moral turpitude." As the Act now reads the words "involving moral turpitude" clearly refer to a felony, crime or misdemeanor committed prior to entry.

In conclusion we submit: First, that appellee at the time of his re-entry in 1914 was not guilty of the commission of a crime involving moral tur-

pitude, and therefore did not belong to the classes excluded by the provisions of Section 3 of the Act of February 5th, 1917. Second, that, if it could be said that he belonged to the excluded classes, his status was unalterably fixed as of the date of his re-entry in 1914 and that the five-year limitation applies.

Respectfully submitted,

M. J. GORDON,
TENNANT & CARMODY,
Attorneys for Appellee.

No. 4360

United States

Circuit Court of Appeals

For the Ninth Circuit.

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government,

Appellant,

vs.

MON HIN,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the Western District of Washington, Northern Division.

The Filmer Bros. Electrotype Co., San Francisco—11—5—24—60

No. 4360

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LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government,

Appellant,

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Transcript of Record.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index. Page

NAMES AND ADDRESSES OF COUNSEL.

THOMAS P. REVELLE, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Appellant.

DONALD G. GRAHAM, Esq., 310 Federal Building, Seattle, Washington,
Attorney for Appellant.

JAMES KIEFER, Esq., 327 Colman Building, Seattle, Washington,
Attorney for Appellee. [1*]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

PETITION FOR WRIT OF HABEAS CORPUS.

To the Honorable the Judges of the Above-entitled Court:

The petition of Mon Hin respectfully represents:

I.

That he is the stepson of Li Sing, a Chinese citizen of the United States born therein, and residing at Fernandina, Florida, that your petitioner arrived at the port of Seattle on the SS. "President Madison," and upon arrival was examined, and

*Page-number appearing at foot of page of original certified Transcript of Record.

testimony has since been taken in Fernandina, Florida, showing that petitioner's mother, Wong See, is residing at Ferdandina, Florida, with Li Sing, and your petitioner is the minor son of Wong See.

II.

That Li Sing is a merchant residing at Ferdandina, Florida, engaged in business in buying, curing and selling fish.

III.

That your petitioner was on July 15, 1924, denied admittance to the United States upon the ground, as your petitioner understands it, that the Board of Special Inquiry held and ruled that Li Sing is not a merchant.

IV.

That your petitioner appealed from the finding and decision [2] of the Board of Special Inquiry to the Secretary of Labor and Commissioner General of Immigration, and upon such appeal the finding of the Board of Special Inquiry was affirmed, and the United States Commissioner of Immigration at the port of Seattle was directed to deport your petitioner, and will unless restrained by the order of this Court, deport your petitioner on August 12, 1924.

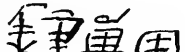
V.

That your petitioner was denied a fair and impartial hearing in this, that all the evidence taken shows without dispute that your petitioner's stepfather, Li Sing, is a merchant, and that he is a native-born citizen of the United States, and that

your petitioner is his minor stepson, and the only point disputed by the Board of Special Inquiry and Secretary is that Li Sing, your petitioner's stepfather, is not a merchant.

WHEREFORE, your petitioner prays that a writ of habeas corpus may be issued herein, and that upon the hearing of such writ it may be adjudged and decreed that your petitioner is entitled to enter the United States; and that he be discharged from the custody of the Immigration Commissioner at the port of Seattle.

Chinese Signature:



MON HIN,

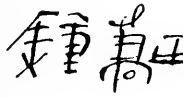
Petitioner.

JAMES KIEFER,
Attorney for Petitioner,
Suite 327 Coleman Bldg.,
Seattle, Washington.

United States of America,
Western District of Washington,
County of King,—ss.

Mon Hin, being sworn according to law, says: That he is the petitioner above named; that he has heard the foregoing petition read and explained, and that the facts therein stated are true.

Chinese Signature:



MON HIN.

Subscribed and sworn to before me this 1st day of August, 1924.

JAMER KIEFER,
Notary Public in and for the State of Washington,
Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 4, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [3]

In the United States District Court in and for the Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

ORDER TO SHOW CAUSE.

In this cause, on reading the petition of Mon Hin, it is by the Court ORDERED and CONSIDERED, that Luther Weedin, United States Commissioner of Immigration at the port of Seattle, do show cause before this Court on the 12th day of August, 1924, at ten o'clock A. M., at the Federal Court House in the city of Seattle, why a writ of habeas corpus should not issue, as prayed for in said petition.

Dated August 4th, 1924.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 4, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I served the annexed order to show cause on the therein named Luther Weedin, United States Commissioner of Immigration, by handing to and leaving a true and correct copy thereof with him, personally, at Seattle, in said district, on the 4th day of Aug., A. D. 1924.

E. B. BENN,
U. S. Marshal.
By E. E. Gaskill,
Deputy. [4]

In the United States District Court in and for the Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN, for Writ of Habeas Corpus.

POINTS AND AUTHORITIES ON BEHALF OF PETITIONER.

An inspection of the record return as a part of

this case shows that the rejection was based upon just one thing, namely, that Li Sing, the stepfather of the petitioner, is not a merchant. The relationship appears from the record to be conceded, and it is conceded that under the law if Li Sing is a merchant, he is entitled to bring in his stepson, a member of his family. The sole ground for refusal to admit is that Li Sing, the stepfather, is a laborer and not a merchant. This reduces the question before the Court to a narrow compass.

It appears from the record that Li Sing, or as his name appears in some places Jung Li Sing, is a resident of Fernandina, Florida; is a native-born citizen of the United States, and in 1921, obtained a certificate of identity No. 37218, visited China, and returned as a citizen. His wife, the mother of the petitioner, was admitted, together with her husband, Li Sing, in October, 1921, at Seattle. Li Sing's admission was as a native.

It is shown by the testimony of Li Sing on the 2d page that he has been for three years past buying, drying and exporting to China and Canada shark fins, terrapin, etc. He has invested in the business $2,000.00; they did a business of $3,000.00 during the past year. The testimony of Frank F. Miller, F. H. Gorinflo, R. G. Lohman [5] and E. Mezell all corroborate this. It is true that he has not obtained a certificate as a merchant, but being a native-born citizen, that is unnecessary. There is no dispute as to the fact.

The fact that Li Sing in large part personally performs the labor of curing and drying and pack-

ing and shipping the fish in nowise detracts from his status as a merchant. Neither does the fact that he may occasionally assist his wife for an hour or so in the work of the laundry. The statute, as construed by the courts, defines a merchant as one whose principal business is buying and selling, and permits the performance of such manual labor as is incident to the business. Neither is it reasonable to require a man to allow an investment to be lost for want of a little personal attention.

It appears that Li Sing owns the laundry and his wife operates it, and that he occasionally and casually assists her for an hour at a time. Certainly a merchant who has outside interests may give them such attention as he can, even if it costs a small amount of labor.

In some of the cases the Courts appear to lay stress upon the fact of working for wages. In case of Ow Yang Dean vs. U. S., 145 Fed. 801, is very similar to the one under consideration. The facts in that case were that the applicant for admission on his return to the United States, after a visit to China, owned an interest in a fishing company as well as an interest in other concededly mercantile firms. The evidence showed that during the year prior to his departure from the United States the applicant who was seeking to enter was occasionally engaged in picking shrimp, picking crabs, and delivering goods, but most of his time he was engaged in keeping the books of the shrimp company, and that occasionally he picked shrimp after they were brought to the store, and delivered rush orders

of goods, and now [6] and then cracked and picked crabs in the store in connection with the business of the shrimp company in buying and selling goods of that nature.

It was held by the Circuit Court of Appeals for the Ninth Circuit that the manual labor performed by the Chinaman was only such as was incidental to the business in which he was financially interested, and did not deprive him of his status as a merchant.

A reading of that case will disclose that the facts are closely parallel to those in the case under consideration. The criterion seems to be, is the alleged merchant engaged in buying and selling goods. In the case at bar, nobody disputes that. Not a single witness testified in contradiction to the testimony of Li Sing, and it appears from the testimony of a white man, E. Mezell, a bank president, that he carries a substantial bank account.

The case of Tom Hong et al. vs. U. S., 193 U. S. 517, 48 L. Ed. 772, is much in point.

In Ong Chew Long vs. Burnett, 232 Fed. 853, the rule is laid down that the test is the buying and selling of goods and it is this that establishes the status of a merchant.

See also Lew Toy vs. U. S., 242 Fed. 405.
Lew Sing Chang vs. U. S., 222 Fed. 195.
Lee Kahn vs. U. S., 62 Fed. 914.
Palmero vs. Tod, 296 Fed. 345 (C. C. A.)
Woo Hoo vs. White, 243 Fed. 541.

It is difficult to understand how the Board of Special Inquiry and the Secretary made the finding that Li Sing is not a merchant. This conclusion can only be reached by ignoring all the testimony in the case. There is not a scintilla of evidence to support the finding that he is not a merchant.

The effect of the marriage of Li Sing to the petitioner's [7] mother, and the taking of the petitioner into Li Sing's family, and Li Sing providing for him, is that Li Sing has adopted the petitioner under the Chinese law as well as under the common law. He is to be treated as the adopted son of a citizen, and upon that ground is entitled to admission.

It is respectfully submitted that the writ should be granted and the petitioner admitted to the United Statees and set at liberty.

JAMES KIEFER,
Attorney for Petitioner.

Received copy of the foregoing points and authorities on behalf of petitioner this 8th day of August, 1924.

THOS. P. REVELLE,
MM.
U. S. District Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 8, 1924. F. M. Harshberger. Clerk. By S. E. Leitch, Deputy. [8]

In the United States District Court, Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for Writ of Habeas Corpus.

AUTHORITIES ON BEHALF OF COMMISSIONER OF IMMIGRATION.

White vs. Kwock Sue Lum, 291 Fed. 732.
Yee Won vs. White, 256 U. S. 399.
Low Wah Suey vs. Backus, 225 U. S. 460.
Comp. Statutes, sec. 4290 et seq. (Chinese Exclusion Act).

THOS. P. REVELLE,
United States Attorney.
DONALD G. GRAHAM,
Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 28, 1924. F. M. Harshberger, Clerk. [9]

United States District Court, Western District of of Washington, Northern Division.

No. 8717.

In the Matter of the Application of MON HIN for a Writ of Habeas Corpus.

RETURN TO ORDER TO SHOW CAUSE.

To the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington:

I, Luther Weedin, to whom the annexed writ of habeas corpus is directed have now here before the Court the body of the said Mon Hin therein named as therein commanded, and I hereby certify that I am the United States Commissioner of Immigration at Seattle, Washington; that the said Mon Hin is detained and held by this respondent for deportation from the United States as an alien person not entitled to admission under the laws of the United States and subject to deportation under the laws of the United States; that the said Mon Hin was detained by this respondent at the time he the said Mon Hin arrived in the United States, to wit, the 4th day of June, 1924, as an alien person not entitled to admission under the laws of the United States and subject to deportation under the laws of the United States pending a decision on his application for admission to the United States as being the stepson of a native-born [10] citizen; that at a hearing before the Board of Special Inquiry the said Mon Hin was unable to furnish proof that he was the natural son of a citizen of the United States or that he was the minor child of an alien Chinese citizen of mercantile status or to furnish proof that his stepfather, an American citizen, held a mercantile status, and his appli-

cation for admission to the United States was denied; that the said Mon Hin applied for an appeal from the decision of the Board of Special Inquiry to the Secretary of Labor and thereafter the decision of the Board of Special Inquiry was affirmed by the Secretary of Labor's and the Commissioner of Immigration's Board of Review; that since the final decision of the said Board of Review, respondent has and now holds and detains the said Mon Hin for deportation from the United States as an alien person not entitled to admission under the laws of the United States and subject to deportation under the laws of the United States; that the original records of the Department of Labor, Bureau of Immigration both on the hearing before the Board of Special Inquiry at Seattle, Washington, and on the submission of the records on the appeal to the Secretary of Labor at Washington, D. C., in the matter of the application of Mon Hin for admission to the United States are hereto attached and made a part and parcel of this return as fully and completely as though set forth herein in full.

WHEREFORE, respondent prays that the said Mon Hin be remanded to the custody of the respondent.

LUTHER WEEDIN,
Commissioner of Immigration. [11]

United States of America,
Western District of Washington,
Northern Division,—ss.

Luther Weedin, being first duly sworn, on oath deposes and says: That he is Commissioner of Im-

migration named in the foregoing return; that he has read the said return, knows the contents thereof and believes the same to be true.

LUTHER WEEDIN.

Subscribed and sworn to before me this 28th day of August, 1924.

[Seal] D. L. YOUNG,

Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 29, 1924. F. M. Harshberger, Clerk. [11½]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

DECISION.

Filed September 6, 1924.

JAMES KIEFER, Esq., Attorney for Petitioner.

C. T. McKINNEY, Esq., Asst. U. S. Atty., Attorney for United States.

NETERER, District Judge:

Petitioner seeks admission, alleging that he is the son of a Chinese native of the United States, a merchant at Fernandina, Florida. The nativity

and stepson relation is conceded; also that minor children, natural or adopted, of alien merchants, are admissible. It is objected by the Board of Review that the stepfather, a native citizen (Chinese) although a merchant, will not exempt applicant from admission because such law has relation only to aliens who are merchants. The dual relation of citizen and merchant should not, however, prejudice the petitioner. Birth relates to the stepfather only, while the merchant status reflects the right to the privilege of entry sought.

It is also said that Sec. 2, Exclusion Act as amended, is conclusive against entry since the stepfather is a laborer, being engaged in "drying fish for exportation." He says: "for the past three years I have been buying, drying and exporting to China and Canada shark fins, terrapin, etc." The stepfather has a place of business, regularly exports shark fins, terrapin, etc., has a half interest ($2,000) in the Mee Jan Company, and is manager, buyer and shipper for the company—did $3,000 worth of business last year. The company buys the fish, dries it preparatory to export, and ships it. It seems clear from the testimony that the stepfather's business is differentiated from fishing and drying in that the business is buying and exporting; the drying is merely incident to that business. A number of white men living in the community testified in support of the stepfather's contentions. Writ granted.

Cases cited by petitioner:

Ow Yang Dean vs. U. S., 145 Fed. 801.
Tom Hong et al. vs. U. S., 193 U. S. 517, 48 L. Ed. 772.
Ong Chew Long vs. Burnett, 232 Fed. 853.
Lew Toy vs. U. S., 242 Fed. 405.
Lew Sing Chang vs. U. S., 222 Fed. 195.
Lee Kahn vs. U. S., 62 Fed. 914.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 6, 1924. F. M. Harshberger, Clerk. [12]

In the United States District Court in and for the Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

ORDER GRANTING WRIT OF HABEAS CORPUS.

In this cause, the petitioner, Mon Hin, having on August 4, 1924, presented his petition for writ of habeas corpus, and the Court having on that day granted an order requiring Luther Weedin, as United States Commissioner of Immigration at the port of Seattle, to show cause why a writ of habeas corpus should not be granted in accordance with the prayer of said petition, and return to said

order to show cause having been made by said Weedin, and the matter having been on August 29, 1924, argued and submitted to the Court and taken under consideration by the Court, and the Court having on September 6, 1924, filed a decision in writing granting said petition, and directing that writ of habeas corpus issue,—

It is by the Court now ordered and considered, and the Court does hereby order and consider, that a writ of habeas corpus do issue to Luther Weedin, as United States Commissioner of Immigration at the port of Seattle, commanding him to produce before this Court the body of the said Mon Hin on the 15th day of September, 1924, at ten o'clock A. M., then and there to do, receive and submit to what the Court shall order in the premises.

Done in open court, September 8, 1924.

JEREMIAH NETERER,
Judge.

Received copy 9/9/24.

DONALD G. GRAHAM,
Asst. U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 8, 1924. F. M. Harshberger, Clerk. [13]

United States District Court, Western District of Washington.

No. 8717.

WRIT OF HABEAS CORPUS.

The President of the United States of America to LUTHER WEEDIN, Commissioner of Immigration, Seattle, Washington, GREETING:

WE COMMAND YOU, that you have the body of Mon Hin, by you imprisoned and detained, as it is said, together with the time and cause of such imprisonment and detention by whatsoever name said Mon Hin shall be called or charged, before the Hon. Jeremiah Neterer, United States District Judge for the Western District of Washington, at the courtroom of said Court, in the city of Seattle in the Northern Division of said Western District of Washington, on the 15th day of September, A. D. 1924, at 10 o'clock in the forenoon, to do and receive what shall then and there be considered concerning him the said Mon Hin.

And have you then and there this writ.

WITNESS the Hon. JEREMIAH NETERER, Judge of the United States District Court for the Western District of Washington, this 8th day of September, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] F. M. HARSHBERGER,
Clerk.
By S. M. H. Cook,
Deputy Clerk.

RETURN ON SERVICE OF WRIT.

United States of America,
Western District of Washington,—ss.

I hereby certify and return that I have served the annexed order on the therein named Luther Weedin by handing to and leaving a true and correct copy thereof with him, personally, at Seattle, in said district, on the 8th day of Sept., A. D. 1924.

E. B. BENN,
U. S. Marshal.
By E. E. Gaskill,
Deputy.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 9, 1924. F. M. Harshberger, Clerk. [14]

United States District Court, Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Application of MON HIN for a Writ of Habeas Corpus.

RETURN TO WRIT OF HABEAS CORPUS.

To the Honorable JEREMIAH NETERER, Judge of the District Court of the United States for the Western District of Washington:

Comes now Luther Weedin, United States Commissioner of Immigration at Seattle, Washington,

and for return to the writ of habeas corpus heretofore served upon him, herewith produces in court the body of Mon Hin, and shows and certifies to this court:

That the statement of facts in the return to the order *of* show cause, heretofore filed herein, is true and correct, and by reference thereto, is made a part of this return the same as though set forth in full.

WHEREFORE, having made a full and complete return and certificate as to the manner and authority by which the said Mon Hin is held, Luther Weedin, United States Commissioner of Immigration, who makes this return, prays this Court for an order quashing the writ of habeas corpus heretofore entered.

LUTHER WEEDIN,
United States Commissioner of Immigration. [15]

United States of America,
Western District of Washington,
Northern Division,—ss.

John L. Zurbrick, being first duly sworn, on oath deposes and says: That he is Assistant Commissioner of Immigration at Seattle, Washington, and as such makes this verification for and on behalf of Luther Weedin, Commissioner of Immigration at said place; that he has read the foregoing return, knows the contents thereof and that the same is true, as he verily believes.

JOHN L. ZURBRICK.

Subscribed and sworn to before me this 15th day of September, 1924.

[Seal] D. L. YOUNG,
Notary Public in and for the State of Washington, Residing at Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [16]

In the United States District Court in and for the Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN, for a Writ of Habeas Corpus.

ORDER DISCHARGING PETITIONER.

In this cause, the petitioner, Mon Hin, having on August 4, 1924, presented his petition for a writ of habeas corpus, and the Court having on that day granted an order requiring Luther Weedin, as United States Commissioner of Immigration at the port of Seattle, to show cause why a writ of habeas corpus should not be granted in accordance with the prayer of said petition, and return to said order to show cause having been made by said Weedin, and the matter having been on August 29, 1924, argued and submitted to the Court and taken under consideration by the Court, and the Court hav-

ing on September 6, 1924, filed a decision in writing granting said petition, and directing that writ of habeas corpus issue; and,

The Court having on September 8, 1924, made and entered an order herein granting a writ of habeas corpus directed to Luther Weedin, as United States Commissioner of Immigration at the port of Seattle, commanding him to produce before this Court the body of the said Mon Hin on this day, then and there to do, receive and submit to what the Court shall order in the premises, and the said Luther Weedin, as United States Commissioner of Immigration at the port of Seattle as aforesaid, having on this day made return to said writ of habeas corpus and having produced in open court the body of Mon Hin in [17] obedience to said writ, and having shown no other or further cause of detention than heretofore shown in response to the aforesaid order to show cause;

IT IS BY THE COURT ORDERED, CONSIDERED AND ADJUDGED, AND THE COURT DOES HEREBY ORDER, CONSIDER AND ADJUDGE, that the said Mon Hin be, and he is, hereby enlarged and discharged from any further detention or confinement by the said Luther Weedin, as United States Commissioner of Immigration at the port of Seattle as aforesaid, and he, the said Mon Hin, do go hence without day.

Done in open court this 15th day of September, 1924.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

United States District Court, Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

PETITION FOR APPEAL.

Luther Weedin, United States Commissioner of Immigration at the port of Seattle, the respondent above named, deeming himself aggrieved by the order and judgment entered herein on the 15th day of September, 1924, does hereby appeal from the said order and judgment to the United States Circuit Court of Appeals for the Ninth Circuit, and prays that a transcript and record of proceedings and papers upon which said order and judgment is made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial District of the United States.

THOS. P. REVELLE,
United States Attorney for the Western District of Washington,

By DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for Appellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

United States District Court, Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

NOTICE OF APPEAL.

To Mon Hin, and to James Kiefer, Attorney for Mon Hin:

YOU, AND EACH OF YOU, are hereby notified that Luther Weedin, as United States Commissioner of Immigration at the port of Seattle, respondent above named, hereby and now appeals from that certain order, judgment and decree made herein by the above-entitled court on the 15th day of September, 1924, adjudging, holding, finding and decreeing that the above-named petitioner for writ of habeas corpus, Mon Hin, be discharged from the custody of said United States Commissioner of Immigration and from the whole thereof,

to the United States Circuit Court of Appeals for the Ninth Circuit.

THOS. P. REVELLE,
United States Attorney for the Western District of Washington,

By DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for Luther Weedin, United States Commissioner of Immigration for the Port of Seattle.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

United States District Court, Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

ORDER ALLOWING APPEAL AND FIXING BOND OF PETITIONER.

Now, to wit, on the 15th day of September, 1924, it is ordered that the appeal be allowed as prayed for, and

It is further ordered that the petitioner for writ of habeas corpus may remain at large pending said appeal, on stipulation of U. S. Attorney upon

executing a recognizance or bond to the United States of America, to the satisfaction of the clerk of the court, in the sum of Seven Hundred Fifty Dollars cash, or $1000.00 Surety Co. bond *Dollars,* for the appearance of said petitioner to answer the judgment of the Circuit Court of Appeals, if the judgment of the District Court shall be reversed.

Done in open court this 15th day of September, 1924.

JEREMIAH NETERER,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [21]

United States District Court, Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

ASSIGNMENTS OF ERROR.

I.

The Court erred in holding and deciding that the petitioner, Mon Hin, did not have a fair and impartial trial before the Inspector of Immigration conducting his hearing.

II.

The Court erred in holding and deciding that a writ of habeas corpus be awarded to the petitioner herein.

III.

The Court erred in holding, deciding and adjudging that the petitioner, Mon Hin, be discharged from the custody of Luther Weedin, as Commissioner of Immigration at the port of Seattle, Washington.

IV.

The Court erred in deciding, holding and adjudging that the petitioner, Mon Hin, was not subject to exclusion and deportation, but was entitled to come in and remain in, the United States.

THOS. P. REVELLE,
United States Attorney.
DONALD G. GRAHAM,
Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [22]

United States District Court, Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

STIPULATION.

IT IS HEREBY STIPULATED and agreed by and between James Kiefer, attorney for Mon Hin, appellee, and Thos. P. Revelle and Donald G. Graham, United States Attorney and Assistant United States Attorney, respectively, as attorneys for Luther Weedin, Commissioner of Immigration, appellant, that the original file and record of the Department of Labor covering the deportation proceedings against the petitioner, which was filed with the respondent's return in the above-entitled cause may be by the clerk of this court sent up to the clerk of the Circuit Court of Appeals, as part of the appellate record in order that the said original immigration file may be considered by the Circuit Court of Appeals, in lieu of a certified copy of said record and file, and that said original records may be transmitted as part of the appellate record.

THOS. P. REVELLE,
United States Attorney,
DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for Appellant.
JAMES KIEFER,
Attorney for Appellee.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [23]

United States District Court, Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

ORDER FOR TRANSMISSION OF ORIGINAL RECORD.

Upon stipulation of counsel, it is by the Court ORDERED, and the Court does hereby ORDER that the clerk of the above-entitled court transmit with the appellate record in said cause the original file and record of the Department of Labor, covering the deportation proceedings against the petitioner, which was filed with the return of the Commissioner of Immigration to the order to show cause, directly to the clerk of the Circuit Court of Appeals for the Ninth Circuit, in order that the said original immigration file may be considered by the Circuit Court of Appeals in lieu of a certified copy of said record.

Done in open court this 2d day of October, 1924.

JEREMIAH NETERER,
United States District Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 2, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [24]

United States District Court, Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

PRAECIPE OF APPELLANT FOR TRANSCRIPT OF RECORD ON APPEAL.

To the Clerk of the Above-entitled Court:

You will please prepare and duly authenticate the transcript and following portions of the record in the above-entitled case for appeal of the said appellant, heretofore allowed, to the United States Circuit Court of Appeals for the Ninth Circuit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Points and authorities on behalf of petitioner.
4. Authorities on behalf of Commissioner of Immigration.
5. Return to order to show cause.
6. Decision of Honorable Jeremiah Neterer.
7. Order granting writ of habeas corpus.
8. Writ of habeas corpus.
9. Order discharging petitioner.
10. Petition for appeal.
11. Notice of appeal.
12. Order allowing appeal and fixing bond of petitioner.
13. Assignments of error.
14. Citation.

15. Return to writ of habeas corpus. [25]
16. Stipulation allowing original file and record of the Department of Labor to be sent to the Clerk of the Circuit Court as part of the Appellate Record.
17. Order for transmission of original file and record.
18. This praecipe.

THOS. P. REVELLE,
United States Attorney,
DONALD G. GRAHAM,
Assistant United States Attorney,
Attorneys for Appellant.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Oct. 1, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD ON APPEAL.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States

District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 26, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as is required by praecipe of counsel filed and shown herein, as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on appeal herein, from the judgment of said United States District Court for the Western District of Washington, to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses and costs incurred in my office on behalf of the appellant, for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [27]

Clerk's fees (Sec. 828 R. S. U. S.) for making record, certificate or return, 57 folios at 15¢	$8.55
Certificate of clerk to transcript of record, 4 folios at 15¢	.60
Seal to said certificate	.20
Certificate of clerk to original exhibits, 2 folios at 15¢	.30
Seal to said certificate	.20

I hereby certify that the above cost for preparing and certifying record, amounting to $9.85, will be included as constructive charges against the United

States in my quarterly account to the Government of fees and emoluments for the quarter ending December 31, 1924.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said district, this 11th day of October, 1924.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court, Western District of Washington. [28]

United States District Court, Western District of Washington, Northern Division.

No. 8717.

In the Matter of the Petition of MON HIN for a Writ of Habeas Corpus.

CITATION.

The United States of America,—ss.
To Mon Hin, GREETING:

WHEREAS, Luther Weedin, United States Commissioner of Immigration at the port of Seattle, Washington, has lately appealed to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment, order and decree lately on, to wit, the 15th day of September, 1924, rendered in the District Court of the United States for the Western District of Washington, made in favor of you, adjudging and decreeing that Mon Hin be discharged from the custody of said Luther

Weedin as United States Commissioner of Immigration at the port of Seattle, Washington, and setting him at large.

YOU ARE THEREFORE CITED to appear before the United States Circuit Court of Appeals in the city of San Francisco, State of California, on the 15th day of October next, to do and receive what may obtain to justice to be done in the premises.

GIVEN under my hand in the city of Seattle, in the Ninth Circuit, this 15th day of September, in the year of our Lord, nineteen hundred twenty-four, and the Independence of the United States the one hundred forty-eighth.

[Seal] JEREMIAH NETERER,
Judge of the U. S. District Court for the Western District of Washington. [29]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 15, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [30]

[Endorsed]: No. 4360. United States Circuit Court of Appeals for the Ninth Circuit. Luther Weedin, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government, Appellant, vs. Mon Hin, Appellee. Transcript of Record. Upon Appeal from the

United States District Court for the Western District of Washington, Northern Division.

Filed October 14, 1924.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4360

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government, Appellant

vs.

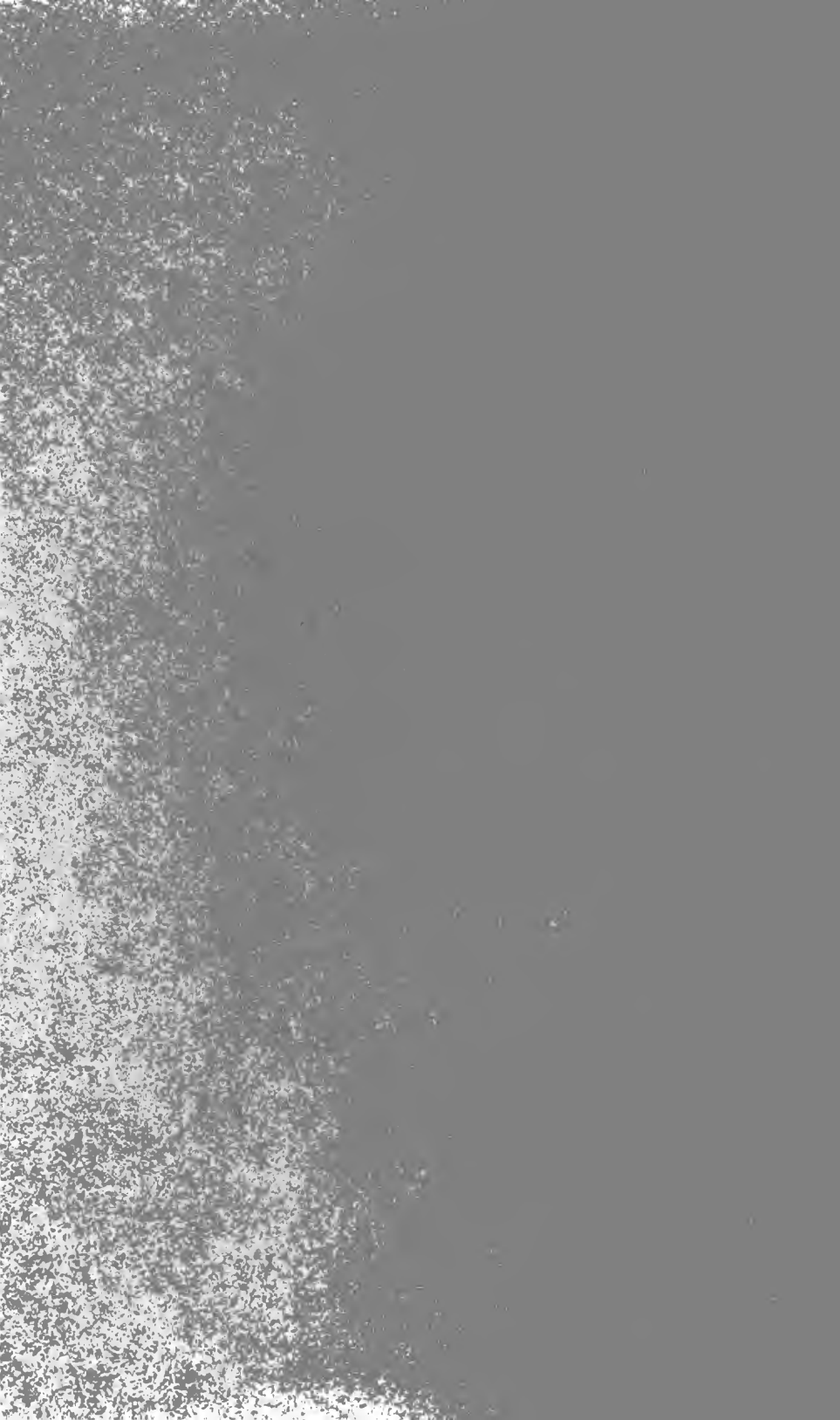
MON HIN, Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division.
Honorable Jeremiah Neterer, Judge

Brief of Appellant

THOS. P. REVELLE,
United States Attorney
DONALD G. GRAHAM,
Assistant United States Attorney
Attorneys for Appellant.

Office and Post Office Address:
310 Federal Building, Seattle, Washington



In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4360

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government, Appellant

vs.

MON HIN, Appellee.

Appeal from the United States District Court for the Western District of Washington, Northern Division.
Honorable Jeremiah Neterer, Judge

Brief of Appellant

STATEMENT OF THE CASE.

On June 4, 1924, the petitioner, Mon Hin, arrived at Seattle, Washington, and applied for admission to the United States as the stepson of Li Sing, an American citizen. The petitioner is eighteen years of age and has a wife and son in China. He testified that his occupation prior to his application for admission was that of delivering goods

for a drug store, when not attending school. Li Sing, his stepfather, was born in the United States and is therefore an American citizen, although of Chinese blood. He has always lived in the United States except for a trip to China in 1921, when he married Wong Shee. The petitioner is the son of Wong Shee by a former marriage.

Li Sing, the petitioner's stepfather, testified that he is engaged in the buying, drying and exporting to China and Canada of shark's fins, terrapin fish, etc., at Fernandina, Florida, under the name of Mee May Jan Company, stating that he was the manager, buyer and shipper of this company; that he had about Two Thousand ($2000) Dollars invested in the business, and that he did all the manual labor connected with the buying, drying, preparation, selling and shipping of the shell fish, with the exception of hiring a man occasionally to help pack the fish. He states that he has one partner who has a similar investment in the business; that they kept no stock books, nor papers, and operated simply under a license from the state capitol of Florida, for buying and shipping shell fish. The volume of business transacted during the past year amounted to Three Thousand ($3000) Dollars.

In addition to the buying and selling of shell fish, Li Sing owns a laundry operated in the same building where he dries the fish. The laundry is operated by his wife and himself. He states that he sometimes spends one or two hours a day in the laundry. This participation in the laundry work by Li Sing is confirmed by the testimony of a colored woman employee of the laundry.

The premises occupied by Li Sing are stated by the Immigration Inspector at Jacksonville to consist of a two story frame building, the first floor being occupied by the laundry, and the second floor being used for drying shark fins. There are also some out buildings where the Inspector found one thousand live terrapins. It appeared that the shipments which Li Sing made occurred about once every two or three months. It also appeared he purchased from five to forty-five pounds of shark fins about every other day, and from one to seventy-five terrapins about once a week.

ASSIGNMENTS OF ERROR.

I.

The court erred in holding and deciding that the petitioner, Mon Hin, did not have a fair and impartial trial before the Inspector of Immigration conducting his hearing.

II.

The court erred in holding and deciding that a writ of *habeas corpus* be awarded to the petitioner herein.

III.

The court erred in holding, deciding and adjudging that the petitioner, Mon Hin, be discharged from the custody of Luther Weedin, as Commissioner of Immigration at the port of Seattle, Washington.

IV.

The court erred in deciding, holding and adjudging that the petitioner, Mon Hin, was not subject to exclusion and deportation, but was entitled to come in and remain in, the United States.

ARGUMENT.

Mon Hin Is Inadmissible to the United States as the Chinese Stepson of an American Citizen of Chinese Descent.

No claim is made that Mon Hin is other than a laborer. In fact he testified that his occupation, prior to his application, was that of delivering goods for a store. He is therefore, not entitled to enter the United States under the Chinese Exclusion Laws (C. S. 4290 *et seq*), unless he comes within an exemption. The new Immigration Act of 1924 can not be considered, since the application for entry took place before July 1, 1924.

It is true that the courts have held that the minor children, both adopted and natural, of Chinese merchants lawfully domiciled in the United States are admissible.

U. S. v. Gue Lim, 176 U. S. 459;
U. S. v. Fong Yim, 134 Fed. 938.

But the wife and minor children of a Chinese laborer domiciled in the United States are not admissible.

Yee Won v. White, 256 U. S. 399.

As indicating the intent of Congress in passing the Exclusion Laws, it was stated in the Yee Won case:

"Exclusion of Chinese laborers, with certain definite, carefully guarded exceptions, was a manifest end in view, and for a long time the same design has characterized legislation by Congress. In the opinion of the Government of the United States, the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof."

The Yee Won case further pointed out that the Gue Lim case allowing the entry of minor children of Chinese merchants turned upon the meaning of Section 6 of the Act of July 5, 1884, which statute required a certificate, and the conclusion was that this section would not be construed to exclude the wife of a Chinese person, other than a laborer, since this would obstruct the plain purpose of the Treaty of 1880, which permits the free entry of merchants.

The cases of applications for entry of minor children of American citizens of Chinese descent have not received the attention of the courts, except in a few instances. There is a case, however, which Your Honors decided on August 6, 1923, *White v. Kwock Sue Lum*, 291 Fed. 732, which is almost exectly in point. In this case, Kwock Sue

Lum, a member of the Chinese race, was granted a writ of *habeas corpus* after he had been denied admission to the United States. He was the adopted son of an American citizen of Chinese descent. His foster father was a laborer, being engaged in the restaurant business. The petitioner had been adopted by his foster father at the age of two years, and was seventeen years old at the time of his application for entry. He was married and his wife remained in China. The court said:

"He does not claim citizenship by reason of his adoption, nor does he predicate his right to enter upon his own personal status. His reasoning is that by his adoption he and Kwock Toy became clothed with all the rights and privileges implied in the relation of father and minor child, including the right of dwelling together and of the intimate association of a common home."

The court further states that it has long been the settled policy of the Government, generally, to limit Chinese immigration, and particularly to prohibit the entry and residence of Chinese laborers, and quoted from the Yee Won v. White case *supra.* The order granting the writ of *habeas corpus* and releasing the petitioner was reversed, the court saying:

"The admission of appellee would undoubtedly constitute a clear exception to this well-defined national purpose, not only because of the status of his adoptive father, but because presumably he is in fact a laborer. While technically under the laws of this country, still a minor, he is measurably mature, and apparently with the sanction of the laws of his own country he is the head of a family. It is not pretended that he is a merchant, or that he belongs to any of the exempt classes, and to admit him would be to add to the number of Chinese laborers in the United States. As already suggested, if an exception be made in his favor, it must be because of the citizenship of his adoptive father. The power to exclude alien relatives of a citizen is not open to doubt. In Low Wah Suey v. Backus, 225 U. S. 460, 32 Sup. Ct. 734, 56 L. Ed. 1165, a member of an excluded class was deported, though the wife of a citizen.

"It is then a question of legislative intent, and, no applicable exception having been expressed, upon what ground is one to be presumed or implied? True, we may take cognizance of the natural desire of father and child generally to live in close association one with the other; but even that consideration is much weakened in the instant case. Appellee was born and reared and married in China, all while the adoptive father continued to reside in the United States. Under such circumstances, now to deny admission would not appear to be so harsh and unnatural as to raise the presumption that Congress could not have intended such a result. In the Yee Won case, *supra*, the petitioner

was lawfully in this country. While the source of the right to reside here was different from that of the appellee's adoptive father, still it was a right, and as such was entitled to be respected and protected. The relationship between him and his wife and young children, whom he sought to bring in, in order that they might reside with him, may be assumed to be quite as tender and sacred as that between appellee and his adoptive father. But that consideration was not thought to warrant reading an exception into the general prohibition of the law, the court saying:

" 'Our statutes exclude all Chinese persons belonging to the class defined as laborers, except those specifically and definitely exempted, and there is no such exemption of a resident laborer's wife and minor children.'

"If we exclude the wife and children of Yee Won, a lawful resident, there would seem to be no possible ground for the admission of appellee's family. To admit him, therefore, would be to give heed to his supposed desire to be with his adoptive father, and to disregard the more tender ties binding him to his lawful wife and the infant child of his blood. We cannot think that the citizenship of the adoptive father warrants a construction attended with such a result."

The facts in the case just quoted from closely resemble the facts in the instant case. In both cases, the petitioners, while technically under our laws minors, were measurably mature and

heads of families. In both cases the families are being left behind in China, and no provision of law could allow the entry of their families. It is true that in the Kwong Sue Lum case, *supra*, the foster father was engaged in the restaurant business, and hence is a "laborer," according to the opinion of the court, but the case does not turn on this fact, and it would appear that the same result would have been reached had the foster father been a merchant. The case stresses the labor status of the petitioner and that is exactly the situation in the present case.

In both cases the petitioner is other than the blood son of the American citizen to whom relationship is claimed, as a basis for entry. The status of adopted son and stepson is so similar that both cases should logically receive the same treatment. If an adopted son is excluded, the court cannot consistently admit a stepson. Furthermore, if the court does allow the entry of stepsons, it will encourage many native Americans of Chinese descent to go to China and enter into marriages of convenience with widows having a number of sons. While, of course, there is nothing particularly criminal in such a procedure, nevertheless it is an easy method whereby large numbers of Chinese

laborers can be brought into the country, contrary to the expressed intent of Congress excluding them.

The petitioner here, Mon Hin, attempts to bring in the mercantile character of his stepfather, and appears to claim that he partakes of the same status as his stepfather, namely, that of a merchant, and hence is admissible as such. This is not the claim on which he bases his right of admission, to-wit: as the stepson of a native. His actual status is, of course, that of a laborer. He is to all appearances a man and has reached a man's estate, and is head of a family. The fact that he is married and has a wife in China does not affect his right to admission.

Wo Hoo v. White, 243 Fed. 541.

Assuming for the sake of argument that his stepfather is a merchant, to present him with a mercantile status merely by reason of his relationship by marriage is ridiculous. To allow the petitioner entry under such a fiction would present the spectacle of an American citizen obtaining the entry of a Chinese laborer under an exemption which only belongs to an alien, and as pointed out by the opinion of the Board of Review, such a claim is without foundation or precedent in law. Li Sing is

a *citizen*, and the case must be decided as though any American citizen, you or I, for example, were attempting to bring in a Chinese laborer, who by reason of marriage or adoption claims relationship. Should the fact that the young man has been adopted give him an exemption under the Exclusion Laws? This court has already answered this question in the negative. Certainly it will not make the anomalous and inconsistent holding that he is admissible by reason of his position as the stepson, rather than the adopted son, in view of the fact that the exemption has been created for and exists only in favor of aliens. Li Sing is *not* an alien, and therefore it is unnecessary to consider whether he is or is not a merchant.

IN THE EVEHT THAT IT BECOMES NECESSARY TO CONSIDER THE MERCANTILE STATUS OF THE PETITIONER'S STEPFATHER, IT IS SUBMITTED THAT THE COURT HAS NO JURISDICTION TO PASS UPON THE FINDING OF FACT BY THE BOARD OF SPECIAL INQUIRY TO THE EFFECT THAT THE STEPFATHER IS NOT A MERCHANT.

Judge Neterer, in his opinion, overruled the finding by the Board of Special Inquiry to the effect that Li Sing was not a merchant, and in effect, decided that the petitioner did not have a fair trial, and was therefore entitled to a writ of

hebeas corpus. It is submitted that, under the record, there is no arbitrary element present in the action of the Board of Special Inquiry, and that the court exceeded its jurisdiction in reversing the findings of the Immigration officers charged with this investigation under the Immigration laws.

Section 2 of the Act of November 3, 1893 (Compiled Statutes 4324), provides:

"The words 'laborer' or 'laborers' wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying or otherwise preserving shell or other fish for home consumption or exportation.

"The term 'merchant' as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant, does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant."

An examination of the record in this case shows, without a doubt, that Li Sing, the petitioner's father, spends a great part of his time in the

laundry and in drying fish. Shipments of fish only occur about once every two or three months, and the purchases require very little time. By Li Sing's own admissions, it is shown that he works in the laundry sometimes one or two hours a day. His wife, Wong Shee, states that he helps her in the laundry and the testimony of every other witness is to the effect that he works in the laundry at least to some extent. It seems clear that Li Sing does manual labor which is not necessary in the conduct of his alleged business as a fish merchant, and therefore he cannot be a merchant within the terms of the statutory definition quoted above. Your Honors' attention is called to the fact that "any manual labor" which is not necessarily involved in the conduct of his alleged business as a fish merchant is sufficient to disqualify under the statute.

It is further submitted that Li Sing has failed to prove his mercantile status in respect to his business as a fish merchant. The statute quoted above expressly provides that Chinese employed in fishing, including "those engaged in the taking, drying, or otherwise preserving shell or other fish for home consumption or exportation" are laborers. According to Li Sing's own testimony, he does all the

manual labor connected with the buying, drying, preparation, selling and packing of the fish, with the exception of occasionally hiring a man to help with the packing. The buying and selling occupies a small portion of his time, in comparison with the labor involved in drying and preparing fish. It is, of course, necessary that any Chinaman engaged in drying fish shall dispose of them, and the fact that Li Sing sells or exports his prepared product does not destroy the status he acquires under Section Two of the Act of November 3, 1893, as a "laborer." This act aims to cover Chinese who are in the exact situation of Li Sing.

Section 19 of the Immigration Act of February 5, 1917, provides:

"In every case where any person is ordered deported from the United States under the provisions of this Act, or of any law or treaty, the decision of the Secretary of Labor shall be final."

The attitude and province of the courts in reviewing the decision of the Secretary of Labor is illustrated by the following cases:

Chin Yow v. United States, 208 U. S. 8. In this case, the court held that a Chinese person seeking to enter the United States is entitled to a fair hearing before the Immigration officers, and that

a Federal court has jurisdiction to determine, on habeas corpus, whether he was denied a proper hearing, and if so, to determine the merits of his case, concluding its opinion in these words:

"But unless and until it is proved to the satisfaction of the judge that a hearing, properly so called, was denied, the merits of the case are not open, and, we may add, the denial of a hearing cannot be established by proving that the decision was wrong."

In *Low Wah Suey v. Backus*, 225 U. S. 460, the sourt states:

"A series of decisions in this court has settled that such hearings before executive officers may be made conclusive when fairly conducted. In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings, it must be shown that the proceedings were manifestly unfair, that the action of the executive officers was such as to prevent a fair investigation, or that there was a manifest abuse of the discretion committed to them by the statute. In other cases, the order of the executive officers within the authority of the statute is final. United States v. Ju Toy, 198 U. S. 253; Chin Yow v. United States, 208 U. S. 8; Tang Tun v. Edsell, 223 U. S. 673."

In *White v. Fong Gin Gee*, 265 Fed. 600, a case decided by Your Honors in 1920, it is stated, per Ross, Circuit Judge:

"In the present case, the firm of which the alleged father of the appellee is alleged to have been a partner was engaged in the business of buying and selling poultry and eggs at a fixed place in the town of Woodland, Yolo county. But the evidence introduced before the immigration officers, and made a part of the record before the courts as above stated, shows that practically all of his time was spent in going among the farmers in the vicinity, buying chickens and eggs, and taking them to the city of Sacramento, where he sold them to customers of the firm of which he claimed to be a member, as well as to others. The Secretary of Labor, and the subordinate officers of the Immigration Service, held that in view of those facts, and the further fact that in the testimony of the alleged father he admitted ignorance of certain business interests of the firm in which he claimed to be a partner, particularly in the matter of the ownership by it of a small ranch near Woodland, that he was not a merchant, but a mere peddler or huckster; whereas the view taken by the judge of the court below, and upon which he based his judgment discharging the appellee from imprisonment, is as follows:

" 'As I read the record in this case, the bureau does not find that the father of the detained has no interest in the Woodland store, but bases its findings that he is not a merchant on the fact that he buys and collects chickens from farmers throughout the country and sells and delivers them to customers in Sacramento. But it seems to me that, if the firm of which the father is a member is one

really dealing in poultry and eggs, receiving orders for such and sending the father out to procure and deliver them, this does not make him a peddler within the meaning of the law, even though on his trips he does occasionally solicit eggs and poultry from farmers in the first instance, or look for an occasional purchaser at Sacramento for his surplus supply.'

"It is not and could not be successfully claimed for the appellee that he was not accorded a fair hearing before the officers of the Immigration Service, for the record shows that he was afforded every opportunity to introduce all available testimony and evidence; the case being twice reopened for that purpose, and ample opportunity given counsel for argument in his behalf. From the evidence, and in the light of such argument, the Secretary of Labor decided the fact to be that the appellee's alleged father was not a merchant, but a mere peddler or huckster, and we are of the opinion that his decision of such fact, even if wrong, is conclusive under the above-quoted clause of the act of Congress of February 5, 1917, and under the decisions of the Supreme Court that have been cited.

"The order and judgment of the court below are reversed, with instructions to dismiss the writ of habeas corpus."

In *Chan Gai Jan v. White*, 266 Fed. 869, a Ninth Circuit case decided in 1920, Your Honors stated:

"Based upon the testimony, of which the foregoing recounts the salient features, the question was presented to the Department of Labor to de-

termine whether Chan Moy was a merchant or a laborer, within the intendment of the Chinese exclusion legislation. We can only determine whether the Department of Labor has exceeded its authority, or has misinterpreted the law, in arriving at the conclusion reached by its decision. If there is competent evidence of persuasive character to sustain its findings, its judgment is final and conclusive, and is not susceptible of review or revision by the courts. This latter proposition is now so well established as to need no citation of authorities."

Further citations, to the effect that Li Sing's participation in the laundry business and in the manual labor involved therein, disqualify him as a merchant, are as follows:

Mar Bin Guey v. U. S., 97 Fed. 576;

Lew Quen Wo v. U. S., 184 Fed. 685;

Lai Moy v. U. S., 66 Fed. 955.

It is therefore submitted that the petitioner, Mon Hin, does not come within any exemption allowed by statute or by judicial construction, and is, therefore, excluded as a Chinese laborer under the Chinese Exclusion Laws. Further, that if the status of his stepfather, Li Sing, becomes pertinent to the inquiry, the decision of the Board of Special Inquiry and of the Secretary of Labor's Board of

Review, to the effect that Li Sing is a laborer, and not a merchant, is final and conclusive, since the petitioner was accorded a fair trial, and the record is entirely free from any arbitrary action upon the part of the Immigration officials.

Respectfully submitted,

THOS. P. REVELLE,
United States Attorney,

DONALD G. GRAHAM,
Assistant United States Attorney,

Attorneys for Appellant.

In the

United States Circuit Court of Appeals

For the Ninth Circuit 9

No. 4360

LUTHER WEEDIN, as Commissioner of Immigration at the Port of Seattle, Washington, for the United States Government, Appellant

vs.

MON HIN, Appellee

Appeal from the United States District Court for the Western District of Washington, Northern Division

Honorable Jememiah Neterer, Judge

BRIEF OF APPELLE.

JAMES KIEFER
Attorney for Appellee
Suite 327 Colman Building, Seattle, Washington

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BRIEF OF APPELLE.

ARGUMENT

The contentions made in the first portion of the argument on behalf of the appellant, from pages 5 to 12 of appellant's brief, are eliminated from the case by the position taken by the immigration

authorities, and shown and illustrated in the record of the Immigration Office and found as a part of the return made by the Commissioner to the writ.

Under the immigration law, the administrative officers charged with executing the law occupy a dual function, namely, that of prosecutor and of trier of the facts. In disposing of the case of the appellee, these officers made a record which we contend is binding upon the Government. If this record be read, it will disclose the fact that the rulings in the Immigration Office were made solely and wholly upon the theory that if the stepfather, Li Sing, is a merchant, then Mon Hin is entitled, as his foster son and stepson, to be admitted. This attitude as to the law clearly and distinctly appears from the Immigration Office record which is a part of the return of the appellant Commissioner of Immigration.

Mon Hin, the appellee, was excluded by the Immigration Officers because, as found by such officers (erroneously and arbitrarily) that Li Sing was not a merchant. We submit, therefore, that all of the contentions made on pages 5 to 12 of appellant's brief are outside the case and should be disregarded, and the case disposed of without regard to them.

The rule is well established that a litigant will not be allowed to change his position and theory of a case on appeal. In other words, it is our contention that the Government is bound by the record it made in the Immigration Office, and can not now re-try its case on appeal on a different theory. This is settled by numerous authorities:

Great Lakes National Bank vs. McClure, 176 Fed. 208;

Walker vs. United States, 139 Fed. 409, affirmed 148 Fed. 1022, on opinion of trial court.

In the case just cited, it is held that the United States is estopped by the course and conduct of officers in regard to matters within their charge. We also cite:

Canton Roll & Machine Co. vs. Rolling Machinery Co. of America, 155 Fed. 321-341;

In re City, 140 N. Y. Sup. 124.

Is Li Sing a Merchant?

It seems to us that a reading of the evidence in the immigration record can not fail to satisfy this court, as it satisfied Judge Neterer, that Li Sing, appellee's stepfather, is a merchant. He buys and sells fish, doing, of course, some work in the prepa-

ration of them for the market. This work, however, comes within the statutory definition of engaging in the performance of such manual labor as is necessary in the conduct of his business as such merchant. The manual labor necessary in drying and packing and shipping fish is as much necessary and proper in the conduct of business as is the work of opening groceries, weighing them out, preserving them from deterioration, or any other incidental work of a grocer.

The work done by Li Sing upon his sea foods is very similar to that done by a grocer who might buy foods in bulk and repack them for sale in small containers. The volume of business transacted is not the criterion, the test is the buying and selling of goods. It is nowhere ordained in the statute that in order to attain or preserve the status of a merchant a party engaged in buying and selling goods must sell his goods in the exact form in which he buys them. To sustain the ruling of the Board of Special Inquiry would in effect be legislation. Congress did not see fit to enact a provision to the effect that the goods bought by a merchant must be sold in exactly the same form in which they were purchased. The theory of the appellant would exclude a mer-

chant from the right to take and preserve and make fit for market any goods which had gotten wet or had otherwise met with damage. Not a witness testified to any work done by Li Sing with regard to his mercantile business, other than buying, preparing for market and selling sea foods.

The cases cited in appellant's brief are not in point for the reason that in all of them the fact appears that the Chinaman whose status as a merchant is in question, did not actually work in and about the business in which he was interested. A reading of these cases will disclose that in all of them the Chinaman claiming to be a merchant owned a small financial interest in a mercantile business but gave it no personal attention and worked elsewhere, either cooking, raising fruit or produce, or in some other gainful occupation. Not one of the cases cited approximates the facts in this case.

It is contended, of course, that the appellee is bound by the finding of the Board of Special Inquiry. This is the law in a proper case, but it is not the law that the Board of Special Inquiry may ignore, as they apparently did in this case, all the sworn testimony and make a finding of fact in direct opposition to all of the testimony

and which finding is not supported by any of the testimony. There is no dispute in this case over the facts.

In

Weedin vs. Banzo Okada, 2 Fed. (2nd Series) 321,

and in the case of

Ex parte Hosaye Sakaguchi vs. White, 277 Fed. 913,

this court defined the limits of review of the findings of the Immigration Board and the review of the testimony. In both these cases the court held that the findings of Immigration Officers made in the face of the uncontradicted evidence, and in opposition to all the facts, should be reviewed, and held that they were not binding.

We concede the rule to be that the court will not review findings made upon contradictory evidence, but where the findings find no support whatever in the evidence, but are directly opposed to all the evidence in the case, the court will not regard them as final and conclusive. Any other rule would work the grossest kind of injustice. It is repugnant to all sense of justice that an administrative board may say that a certain thing is true, although all the evidence demonstrates that it is not true;

or the converse, that they may say that a certain thing is not true when all the evidence establishes that the fact exists.

We submit that the case most closely approximating the facts in this case is that of

Ow Yang Dean vs. United States, 145 Fed. 801.

This is a decision of this court, and we submit that it is controlling and decisive of the case at bar. We also cite:

Tom Hong et al. vs. United States, 193 U. S. 517; 48 L. Ed. 772.

The test is the buying and selling of goods, and it is this that establishes the status of a merchant.

In *Ong Chew Long vs. Burnett*, 232 Fed. 853, the rule is laid down that the test is the buying and selling of goods and it is this that establishes the status of a merchant.

See also

Lew Toy vs. U. S., 242 Fed. 405;

Lew Sing Chang vs. U. S., 222 Fed. 195;

Lee Kahn vs. U. S., 62 Fed. 914;

Palmero vs. Tod, 296 Fed. 345 (C. C. A.);

Woo Hoo vs. White, 243 Fed. 541.

Appellant in his brief attempts to make much of the fact that some times Li Sing, the stepfather, assists his wife in the work of the laundry for a short period. It is in evidence that Li Sing owns this laundry. The contention made by appellant would forbid a Chinaman having a financial investment in any business other than that of a merchant to visit the same and supervise or assist for a short time in saving his investment from loss. We contend that no such narrow construction can be put upon the statute. No cases have been cited warranting any such narrow construction.

We respectfully submit that a reading of the record made in the Immigration Office can not fail to convince the court that the ruling of the trial judge is correct, and should be affirmed.

Respectfully submitted,

JAMES KIEFER,

Attorney for Appellee.

No. 4361

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN R. SOUZA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 4361

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Defendant and Plaintiff in Error:
GILMAN & HARNDEN, Esqs., Henshaw Bldg., Oakland, Calif.

For Plaintiff and Defendant in Error:
UNITED STATES ATTORNEY, S. F. Cal.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 11,010.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN R. SOUZA,

Defendant.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make up the transcript on appeal of the above numbered and entitled case, for printing the record thereof for the Ninth Circuit Court of Appeals at San Francisco:

Indictment, plea, verdict, motion for new trial, order overruling motion for new trial, engrossed bill of exceptions, petition for writ of error, assignment of errors, allowance of

writ of error, writ of error, citation on writ of error, stipulation as to record, Clerk's certificate.

GILMAN & HARNDEN,
Attorneys for Appellant and Plaintiff in Error, John R. Souza.

[Endorsed]: Filed Sep. 4, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 11,010.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

J. R. SOUZA,
Defendant.

INFORMATION.

At the March term of said court in the year of our Lord one thousand nine hundred and twenty-two.

BE IT REMEMBERED that Robert H. McCormack, Special Assistant United States Attorney-General, who for the United States in its behalf prosecutes in his own proper person, comes into court on this, the 20th day of April, 1922, and with leave of the said Court first having been had and

*Page-number appearing at foot of page of original certified Transcript of Record.

obtained, gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath, and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof;

NOW, THEREFORE, your informant presents: THAT

J. R. SOUZA,

hereinafter called the defendant, heretofore, to wit, on or about the 9th day of March, 1922, at 2202 E. 17th Street, Oakland, in the county of Alameda, in the Southern Division of the Northern District of California, and within the jurisdiction [2] of this Court, then and there being, did then and there wilfully, and unlawfully have in *their* possession certain property designed for the manufacture of liquor, to wit, 1 50-gallon still, 12 50-gallon barrels of mash, 1 pump, 2 electric motors and 1 electric fan, then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act, in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said property by the said defendants was then and there prohibited, unlawful and in violation of Section 25 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America and contrary to the form of the statute of the said United States of America in such case made and provided.

SECOND COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents: THAT

J. R. SOUZA,

hereinafter called the defendant, heretofore, to wit, on or about the 9th day of March, 1922, at 2202 E. 17th Street, Oakland, in the county of Alameda, in the Southern Division [3] of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there wilfully and unlawfully possess certain intoxicating liquor, to wit, 50 gallons of jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Con-

gress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

THIRD COUNT.

And informant further gives the Court to understand and be informed as follows, to wit:

That the allegations hereinafter set forth, each of which your informant avers and verily believes to be true, are made certain and supported by a special affidavit made under oath and that this information is based upon said affidavit, which said affidavit is hereto attached and made a part hereof.

NOW, THEREFORE, your informant presents: THAT

J. R. SOUZA,

hereinafter called the defendant, heretofore, to wit, on or about the 9th day of March, 1922, at 2202 E. 17th Street, Oakland, in the county of Alameda, in the Southern Division of the Northern District of California, and within the jurisdiction [4] of this Court, then and there being, did then and there wilfully and unlawfully manufacture, certain intoxicating liquor, to wit: 50 gallons of jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the manufacturing of the said intoxicating liquor by the said defendant at the time and place aforesaid was then and there prohibited, unlawful

and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the National Prohibition Act.

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

ROBERT H. McCORMACK,
Special Asst. United States Attorney General.

[5]

United States of America,
Northern District of California,
City and County of San Francisco,—ss.

A. R. Shurtleff, being first duly sworn, deposes and says: That J. R. Souza on or about the 9th day of March, 1922, at 2202 E. 17th St., Oakland, in the county of Alameda, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there possess property designed for the manufacture of intoxicating liquor, to wit, 1 50-gallon still, 12 50-gallon barrels of mash, 1 pump, 2 electric motors and 1 electric fan, then and there intended for use in violating Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act," in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for use for beverage purposes.

That the possession of the said property by the said defendant at the time and place aforesaid was

then and there prohibited, unlawful and in violation of Section 25 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

And affiant on his oath aforesaid doth further state: That J. R. Souza, on or about the 9th day of March, 1922, at 2202 E. 17th St., Oakland, in the county of Alameda, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, did then and there possess and manufacture certain intoxicating liquor, to wit, 50 gallons of [6] jackass brandy, then and there containing one-half of one per cent or more of alcohol by volume which was then and there fit for use for beverage purposes.

That the possession and manufacturing of the said intoxicating liquor by the said defendant at the time and place aforesaid, was then and there prohibited, unlawful and in violation of Section 3 of Title II of the Act of Congress of October 28, 1919, to wit, the "National Prohibition Act."

A. R. SHURTLEFF.

Subscribed and sworn to before me this 19th day of April, 1922.

[Seal] C. M. TAYLOR,

Deputy Clerk, U. S. District Court, Northern District of California.

[Endorsed]: Filed April 20, 1922. W. B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [7]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 6th day of May, in the year of our Lord, one thousand nine hundred and twenty-two. Present: the Honorable MAURICE T. DOOLING, District Judge.

No. 11,010.

UNITED STATES OF AMERICA

vs.

J. R. SOUZA.

MINUTES OF COURT—MAY 6, 1922—ARRAIGNMENT AND PLEA.

This case came on regularly for arraignment of defendant upon the information filed herein against him. Said defendant was present in court with his attorney, duly arraigned upon said information, stated his true name to be as contained therein, waived formal reading thereof and thereupon plead "Not Guilty" of offense charged, which plea the Court ordered and the same is hereby entered. Further ordered case continued to May 27, 1922, to be set for trial. [8]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 11,010.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN R. SOUZA,

Defendant.

BILL OF EXCEPTIONS.

BE IT REMEMBERED that heretofore the United States Attorney, in and for the Northern District of California, did file in the above-entitled action information against the defendant John R. Souza, and that thereafter the said John R. Souza appeared in court and upon being called to plead to said information pleaded not guilty, as shown by the records herein.

AND BE IT REMEMBERED that the defendant, John R. Souza, who will hereafter be called the defendant, having duly pleaded not guilty in the cause being at issue, the same coming on for trial on Wednesday, the 9th day of April, 1924, before the Honorable John S. Partridge, District Judge of said court, and a jury duly empanelled, the United States being represented by J. F. McDonald, Esq., Assistant United States Attorney, and the defendant being represented by D. L. Gilman and Emery

D. Harnden, of the legal firm of Gilman & Harnden. That thereafter the plaintiff, to maintain the issues on its part to be maintained introduced and offered in evidence the following testimony, to wit:

TESTIMONY OF A. R. SHURTLEFF, FOR THE GOVERNMENT.

A. R. SHURTLEFF, called for the United States, being sworn, testified as follows: [9]

Cross-examination.

I am a prohibition officer, and have been for the last four (4) years. I was in that service on the 9th day of March, 1922. That on that occasion I visited the premises located at 2202 East Seventeenth Street, in the city of Oakland, California, the premises owned by the defendant.

Mr. McDONALD.—Why did you visit those premises, Mr. Shurtleff?

WITNESS.—I would like to object to that question, unless it is predicated on something more than the fact of information, and I would like at this time to ask the witness, if I may, what kind of premises these were.

Mr. McDONALD.—I think you will have a chance to cross-examine the witness.

Mr. GILMAN.—I appreciate that, but it appears, apparently, that the premises were entered by virtue of some particular reason, I do not know whether by virtue of a search-warrant or otherwise, and I would like to know what kind of premises they were.

(Testimony of A. R. Shurtleff.)

The COURT.—That is a matter of cross-examination, and if the evidence is improper it will be stricken out and the jury told to disregard it. Go ahead.

At this point the witness testified further: The defendant lives on the premises. The still was found in a tunnel or dugout, as I would call it, underneath the house. I had visited the premises prior to this and had noticed the odor of distillation and fermenting mash around these premises. I am familiar with the odor of fermenting mash and the odor of distillation; a day or so before the search-warrant was secured for the place I visited the place one night, and I could smell odors of distillation and of mash. [10]

On March 9th I was accompanied by Agent Rinckel, Agent McMahon and Agent De Spain. We found a distillation plant. I think it was 50 gallon barrels, and we also found an electric fan, or a fan and the motors to run it, and an electric pump. This dugout—the reason for that was underneath the basement it is a very low basement under the house, I should say about maybe four or five feet; you have to stoop over to walk under it, and we entered from the side of the house, he had a trap-door at the side of the house; we crawled under there; we shoveled away the dirt and found a trap-door about two feet square and going down through this trap-door on a ladder, I guess about 10 feet deep underneath this house, this dirt floor, was this dugout that I described, and in the dugout

(Testimony of A. R. Shurtleff.)

was a complete distilling apparatus. This is the complete distilling plant that I refer to.

EXCEPTION No. 1.

Mr. McDONALD.—I will show you, Mr. Shurtleff, these bottles, and ask you—this one is labeled by yourself, I believe?

WITNESS.—Yes, sir, that is my writing.

Mr. McDONALD.—Do—where was that found?

WITNESS.—That was found in the dugout in the still-room.

Mr. McDONALD.—This is a sample of the fifty gallons of liquor?

WITNESS.—These are three samples. My initials on each.

Mr. McDONALD.—I will ask that these be marked for identification.

Mr. GILMAN.—If your Honor please, I would like to object to the questions asked, as well as to the introduction of any evidence at this time if it is predicated upon a search-warrant until we find out what kind of premises it was he [11] searched. He says a house the defendant lives in.

The COURT.—He did not live in the dugout, did he?

Mr. GILMAN.—No, your Honor, but he lived in the house that was over the dugout.

The COURT.—Overruled.

Mr. GILMAN.—Exception noted, please.

EXCEPTION No. II.

Mr. McDONALD.—You found these bottles? They were labeled in your presence?

(Testimony of A. R. Shurtleff.)

Witness SHURTLEFF.—Yes, sir.

Mr. McDONALD.—They have been in the custody of your superior ever since?

WITNESS.—Yes, sir.

Mr. McDONALD.—Did you know the defendant Souza before this case of March 9th, 1922?

WITNESS.—I did not.

Mr. McDONALD.—Had you ever been to his premises before?

WITNESS.—Oh, yes, I had been to his premises before.

Mr. McDONALD.—State the purpose and occasion of that visit.

Mr. GILMAN.—Objected to, on the ground that it is incompetent, irrelevant and immaterial, before the witness answers.

Mr. McDONALD.—If your Honor please, this charge involves a charge involving intent and I believe that we are entitled to show evidence of prior violations.

The COURT.—Overruled.

Mr. GILMAN.—Exception noted, please.

WITNESS.—(Continues.) We visited these premises on a prior case, to wit, May 9th, 1921. We found 10 or 12 50-gallon barrels of mash, 50-gallon stills set up and running, and stands and motors and found Mr. Souza in the dugout. [12]

EXCEPTION No. III.

Mr. McDONALD.—On this case, Mr. Shurtleff, why you found all this property in the same place?

WITNESS.—Yes, sir.

(Testimony of A. R. Shurtleff.)

Mr McDONALD.—That is all, Mr. Shurtleff.

Mr. GILMAN.—If your Honor please, I would like to make a motion to strike out the last answer of the witness, on the ground that it is incompetent, irrelevant and immaterial, and particularly I wish to call the Court's attention to the fact that is apparently with reference to some subsequent offense.

The COURT.—No, it is before. This was at the previous year. He found the first still in 1921.

Mr. McDONALD.—And his testimony is that he found this still in the same dugout in 1922.

Mr. GILMAN.—I would like to know just what case we are going to trial on.

Mr. McDONALD.—We are going to trial on case No. 110,110 (11,010).

Mr. GILMAN.—110,110 (11,010).

The COURT.—All right, motion denied.

Mr. GILMAN.—Exception noted, please.

On cross-examination the witness testified as follows:

These premises are located at 2202 East 17th Street, Oakland, California. At that time Mr. Souza resided there. I think I see his wife, see a lady there. I think it was his wife. I had a conversation with her. I think it is a home residence. It is not very far from the street, approximately five or ten feet on one side and maybe twenty on the end. Corner house. There is a lawn around it and a fence around the yard. I did not have to go into

(Testimony of A. R. Shurtleff.)

the house to get into [13] this dugout. If I have my directions right the house faces the south and we entered through a little door on the east side of the house from the outside of the house. We got into the yard through the front gate and walked around to the side of the house. A little door on the side of the house led under the house; beneath the house proper, and we crawled in underneath; we came to this dugout; the dugout was directly beneath the house proper. At the time we searched the premises March, 1922, I did not enter the residence there. Nor the other officers to my knowledge. It is not the fact that at the time I searched the premises I went into the residence, went into the home, into the house proper, that I went through the house proper; I went through a trap-door near to the house into this dugout. I do not know as to the trap-door, never called to my attention that there was a trap-door. I did not see a trap-door immediately above the entrance to the dugout which went into the residence proper. It isn't a fact that Commissioner Hardy went out there with me. Nor did he go with the other officers to my knowledge. I entered the premises by virtue of a search-warrant issued by Commissioner Hardy of Oakland. The still was in the dugout, as I call it. The only thing I could not figure out was that he dug this dugout under this board floor underneath the house for a still room only; in fact, he told me himself that it cost him about $1500 to fix the dugout and his property that he had there

(Testimony of A. R. Shurtleff.)

cost him about $1500. It was not used for other purposes. I saw nothing else there besides the property we took. It was not used as a cellar or part of the residence. This dugout or cellar or basement is immediately below the house proper; underneath the house proper, and within the fence that encircled around the house. We were compelled in order to go into the premises to go through a gate, the front gate, and [14] enter the premises; go to the side of the house; go through a small door; crawl on our hands and knees for some distance and then dig away some dirt and then enter this dugout; I say we entered there pursuant to that search-warrant. I or any other person to my knowledge did not purchase or buy any liquor from the defendant there; not that I know of. There was not a sale of intoxicating liquor upon the premises to my individual knowledge. I smelled the odor of distillation there some time previous to the raid, previous to March 9, 1922. I was told that there was liquor being manufactured on the premises. Upon that information and upon the information of my senses; that is my sense of smell, I went to the Commissioner and had a search-warrant issued for the basement, for this dugout. This hole down there was eight by ten or ten by twelve, something like that.

EXCEPTION No. IV.

Mr. GILMAN.—And did you know that there was liquor being manufactured on the premises?

Mr. SHURTLEFF.—I was told so.

(Testimony of A. R. Shurtleff.)

Mr. GILMAN.—You were told so, and upon that information, and upon the information of your senses, that is, your sense of smell, you went to the Commissioner and had a search-warrant issued. Is that correct?

WITNESS.—Yes, for the basement—for this dugout, yes.

Mr. GILMAN.—Have you that search-warrant?

WITNESS.—No, I have not.

Mr. GILMAN.—I think that is all.

Mr. McDONALD.—That is all.

Mr. GILMAN.—About how many rooms has this house, by the way?

WITNESS.—I do not know, I am sure. I was never in it. [15]

Mr. GILMAN.—Just one more question—about how big was this hole down there?

WITNESS.—I would say about eight by ten—ten by twelve—something like that.

Mr. GILMAN.—Yes.

Mr. McDONALD.—Will you take the stand please?

Mr. GILMAN.—If your Honor please, I would like at this time upon the statements of the agent who was just on the witness-stand (referring to witness Shurtleff) to ask the Court to exclude from evidence in this case any property, any liquor, any articles, any material, anything that may have been found in these premises in that particular place that was searched, upon the ground and upon the theory that the search-warrant in this case was

(Testimony of A. R. Shurtleff.)

based upon informattion and belief and that there was no proper cause for its issuance. That there has been no showing of any still (sale) upon the premises. That the premises are a private residence and are occupied by the defendant and his family as such. Therefore, I move you to exclude from the evidence the testimony of Agent Shurtleff, who was just on the witness-stand, as well as to exclude from the evidence any property or other things that were received there. I make that the basis of my motion, or, rather, I make the basis of my motion this: That it is a violation of the defendant's constitutional right and privilege. That there was an illegal and invalid search of his premises and his home. If your Honor wishes me to, I have a very recent authority from the Circuit Court. It is a Circuit Court decision and a recent authority that goes entirely into this question —exactly into this case.

The COURT.—Motion denied.

(Exception to this denial found on pages 14 to 16 of T. R.) [16]

TESTIMONY OF D. W. RINCKEL, FOR THE GOVERNMENT.

D. W. RINCKEL, testifying as a witness for the Government, being sworn, testified as follows:

I am a prohibition officer; have been for the last (4) four years. Accompanied Agent Shurtleff on the 9th day of March, we entered the front gate

(Testimony of D. W. Rinckel.)

at 2202 E. 17th Street, Oakland; walked around to the east side and crawled under the house and a small door was there, about a two by four door, and went up to the front of the house. We were unable at that time to observe any indications of where this pit was, although we could smell the fermentation of mash. We searched there for probably ten or fifteen minutes, until we found alongside of a post, cleverly concealed, two electric wires running down into the ground. We dug down alongside of those wires until we came to the top, which was some boards, and we cleaned off those boards, and finally found a trap-door. We went through the trap-door and down into a room and there we found mash, and about 50 gallons of jackass brandy. I have seen these bottles that have been introduced for the purpose of identification by the prosecution. Those were samples of that jackass brandy taken in my presence. The defendant was not there at that time. He was subsequently arrested. The premises as far as I know were occupied as a private dwelling. There was a woman, his wife, came down and asked us what our business was there. We showed our search-warrant and pursuant to that search-warrant we searched the premises. Witness never purchased any liquor on the premises and does not know of any liquor being sold there of his own knowledge. I went there with the other agents and did not go into the house proper. [17]

(Testimony of D. W. Rinckel.)

Cross-examination.

These premises are occupied as a private residence by the defendant. Had never purchased any liquor on the premises.

EXCEPTION No. V.

At the conclusion of D. W. Rinckel's testimony, the following took place:

Mr. GILMAN.—Just one minute until I make an objection if your Honor please, with reference to the testimony of the Agent Rinckel, who was just examined. If I may, I will make the same objection to his testimony that I make to the former witness' testimony. (Shurtleff). And may, if your Honor please—may an exception be understood now—that I may have an exception to all the rulings made by the Court.

The COURT.—There will be no such rule as that. The rule specifically provides that exceptions must be quoted to rulings.

Mr. GILMAN.—Well, then, at this time, if your Honor please, I will take an exception to the ruling of the Court with reference to the objection that I made formerly.

TESTIMONY OF E. B. McMAHON, FOR THE GOVERNMENT.

As a witness for the Government, being sworn, testified as follows:

I am a prohibition officer and accompanied Agent Rinckel, Shurtleff and the other agents to defendant's premises.

(Testimony of A. R. Shurtleff.)

At this point it was stipulated by defendant that certain liquor which the Government used as an exhibit contained 25 per cent of alcohol by volume.

TESTIMONY OF A. R. SHURTLEFF, FOR THE GOVERNMENT (RECALLED—CROSS-EXAMINATION).

Cross-examination.

Mr. GILMAN.—On March 9th, 1922, this still was not in operation, was it? [18]

WITNESS.—No.

Mr. GILMAN.—And it was not set up ready for use, was it?

WITNESS.—Well, with the crude still like he had, a fifty-gallon still with gooseneck and a drum, it does not take three minutes to set that up, if that is what you are getting at. All you need to do is to put a fire under it and fill it full of mash and it goes to work. I think the pieces of the still are all there.

EXCEPTION No. VI.

At the conclusion of cross-examination of Shurtleff the following took place:

Mr. GILMAN.—I did not note a while ago whether or not the Court overruled my exception or my motions on the question of the exclusion of the evidence.

The COURT.—Yes.

Mr. GILMAN.—The Court did overrule that, and I may have an exception to the rule?

(Testimony of A. R. Shurtleff.)

The COURT.—Yes.

Mr. McDONALD.—That is the Government's case, if your Honor please.

Mr. GILMAN.—Now, if your Honor please, at this time, may I make motion to quash the search-warrant and for the release and dismissal of the defendant, upon the ground that his constitutional rights have been violated, and that a search was made of his home without proof being obtained that liquor was sold on the premises or in the home, that the fourth and fifth amendments of the Constitution have been violated. That the evidence received be excluded. I think that is all.

The COURT.—Motion denied.

Mr. GILMAN.—Exception noted. And further, if your Honor please, that the search-warrant in this case was obtained [19] on information and belief.

The COURT.—Denied on that ground, too.

Mr. GILMAN.—Exception noted.

Thereupon the defendant Souza, to maintain the issues on his part to be maintained, introduced and offered in evidence the following testimony to wit:

TESTIMONY OF JOHN R. SOUZA, IN HIS OWN BEHALF.

JOHN R. SOUZA, called on his own behalf, being sworn, testified as follows:

I reside at 2202 East Seventeenth Street, with my family. We have nine in the family. There were

(Testimony of John R. Souza.)

two other families lived downstairs in two apartments. My home is a two-story house, with a basement underneath. There is an entrance to the basement on the side of the house and also through a little trap-door in one of the rooms on the second floor. The basement may be entered from either way. A fence surrounds the house, and the basement is directly under the house and within the space enclosed by the walls of the house. I have not sold any intoxicating liquor on the premises.

Cross-examination of Defendant Souza.

EXCEPTION No. VII.

Mr. McDONALD.—Mr. Souza, you owned this still that was found there?

Mr. GILMAN.—To which I object. It is not proper cross-examination.

The COURT.—Why?

Mr. GILMAN.—I put him on the witness-stand for two things: First, to prove the residence; second, that he did not sell liquor there. Those are the two questions I asked him.

The COURT.—The Supreme Court, in a case from this district, the case of Diggs and Caminetti, held distinctly that [20] when a defendant goes on the stand in his own behalf he opens up the whole subject. Overruled.

Mr. GILMAN.—Exception noted.

EXCEPTION No. VIII.

Mr. McDONALD.—You owned this still, didn't you, Mr. Souza?

WITNESS.—What is that?

(Testimony of John R. Souza.)

Mr. McDONALD.—That still that was there, that was your still, wasn't it?

WITNESS.—It wasn't a still. It was part of a still.

Mr. McDONALD.—Whatever it was, it was yours, wasn't it?

WITNESS.—Yes.

Mr. McDONALD.—And this jackass brandy, was yours, wasn't it?

WITNESS.—Yes.

Mr. McDONALD.—You were arrested in 1921, weren't you?

Mr. GILMAN.—Just a minute. To which I object as being incompetent, irrelevant and immaterial, and not proper cross-examination.

The COURT.—Overruled.

Mr. GILMAN.—Exception noted.

Mr. McDONALD.—Q. You were arrested in 1921 by Mr. Shurtleff, this man here? A. No.

Q. You say you were not arrested?

A. No, only in 1921.

Q. In 1921, on the 9th day of May, 1921?

A. Yes, I was.

Q. You were?

A. Yes; I do not know the day but I was arrested one time before.

Q. Yes, you were caught that time actually running a still, weren't you? A. Yes. [21]

EXCEPTION No. IX.

The COURT.—Did you (Souza) make this jackass brandy?

(Testimony of Johs R. Souza.)

WITNESS.—No, sir, that was given to me to finish up. That was not finished, that is, not ready to drink.

The COURT.—Did you have mash there?

WITNESS.—Yes, I had mash there.

The COURT.—And there was actually mash there present, was there?

WITNESS.—There was not mash for that purpose. I was trying to run that mash to get rid of it and run that little to make a little liquor for my own use.

Mr. GILMAN.—May it be understood that I may have an exception to the questions asked by the Court?

The COURT.—You may have an objection and an exception.

At the conclusion of all testimony the case was argued by the defendant's counsel, plaintiff's counsel waiving argument, and thereafter the Court instructed the jury, the jury retired for deliberation on the 9th day of April, 1924, and returned and filed a verdict finding the defendant guilty on each one of the three counts in the information. On the same day the Court rendered its sentence and judgment upon the defendant. That the said defendant hereby presents the foregoing as his amended bill of exceptions herein and respectfully asks that the same be allowed, signed and sealed and made a part of the records of this case.

Dated: July 31st, 1924.

GILMAN & HARNDEN,
Attorneys for Defendant. [22]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 11,010.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN R. SOUZA,

Defendant.

STIPULATION RE AMENDED BILL OF EXCEPTIONS.

IT IS HEREBY STIPULATED AND AGREED that the foregoing amended bill of exceptions is correct and the same may be signed, settled and allowed and sealed by the Court.

Dated, this 15th day of August, 1924.

STERLING CARR,
United States Attorney.
GILMAN & HARNDEN,
Attorneys for Defendant. [23]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 11,010.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN R. SOUZA,

Defendant.

ORDER SETTLING AMENDED BILL OF EXCEPTIONS.

This amended bill of exceptions having been duly presented to the Court within the time allowed by law and the rules of the Court and within the time extended by the Court by orders duly and regularly made, is now signed, sealed and made a part of the records of this case, and is allowed as correct.

Dated: This 15th day of August, 1924.

JOHN S. PARTRIDGE,
United States District Judge.

Due service and a receipt of a copy of the within amended bill of exceptions is hereby admitted this 5th day of August, 1924.

STERLING CARR,
By G. D. K.,
Attorney for Plaintiff.

[Endorsed]: Filed Aug. 15, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [24]

At a stated term of the District Court of the United States of America, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Wednesday, the 9th day of April, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 11,010.

UNITED STATES OF AMERICA

vs.

J. R. SOUZA.

MINUTES OF COURT—APRIL 9, 1924—TRIAL.

This case came on regularly this day for trial of defendant, J. R. Souza, upon information filed herein against him. Said defendant was present in court with his attorney, D. L. Gilman, Esq., J. F. McDonald, Esq., Asst. U. S. Atty., was present for and on behalf of United States.

Upon the calling of the case, all parties answering ready for trial, the Court ordered that the same proceed and that the jury-box be filled from the regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been

duly called, sworn, examined, and accepted were sworn to try the defendant herein, viz.:

Frank K. Brown.	B. P. Bosworth.
H. J. Brown.	J. F. Bond.
C. L. McFarland.	Edson F. Adams.
V. B. Anderson.	Clarence E, Allen.
B. F. Brickel.	Ransom E. Beach.
Adolph C. Boldemann.	Theophilus Allen.

Mr. McDonald made statement to the Court and jury as to the nature of the case and called A. R. Shurtleff, D. W. Rinckel and E. B. McMahon, each of whom was duly sworn and examined on behalf of United States, and introduced in evidence U. S. Exhibit No. 1 and rested. [25]

Mr. Gilman made notions to exclude certain evidence and to quash search-warrant herein, which motions the Court ordered denied. Mr. Gilman then called the defendant, J. R. Souza, who was duly sworn and examined in his own behalf.

The case was then argued by Mr. McDonald and Mr. Gilman and submitted, whereupon the Court proceeded to instruct the jury herein, who, after being so instructed, retired at 4:35 P. M., to deliberate upon a verdict, and subsequently returned into court at 4:45 P. M., and upon being called all twelve (12) jurors answered to their names and were found to be present, and, in answer to question of the Court, stated they had agreed upon a verdict and presented a written verdict, which the Court ordered filed and recorded, viz.:

"We, the Jury, find as to the defendant at the bar as follows:

Guilty on 1st Count.
Guilty on 2d Count.
Guilty on 3d Count.

ADOLPH C. BOLDEMANN,
Foreman."

Court ordered jurors discharged from further consideration of this case and from attendance upon the Court until Apr. 10, 1924, at 10 A. M.

Defendant was then called for judgment, fully informed by the Court of the nature of the information filed herein against him, of his arraignment, plea, trial, and the verdict of the jury. Defendant was then asked if he had any legal cause to show why judgment should not be entered herein and thereupon, no sufficient cause appearing why judgment should not be pronounced, the Court ordered that defendant, J. R. Souza, for offense of which he stands convicted, pay a fine in the sum of $500.00 as to First Count, fine of $500.00 as to Second Count, and be imprisoned for a period of 1 year in the county jail, county of San Francisco, State of California, [26] as to Third Count of said information. Ordered that said defendant stand committed to the custody of U. S. Marshal to execute said judgment, and that a commitment issue.

Ordered that the amount of bond for the release and appearance of defendant upon writ of error herein be and the same is hereby fixed in the sum of $2500.00.

Further ordered that the U. S. Exhibit in this case be withdrawn from the files and returned to the United States Attorney. Accordingly said exhibit was delivered to Mr. McDonald in open court. [27]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 11,010.

UNITED STATES OF AMERICA

vs.

JOHN R. SOUZA.

(VERDICT.)

We, the jury, find as to the defendant at bar as follows:

Guilty on 1st count.

Guilty on 2d count.

Guilty on 3d count.

ADOLPH C. BOLDEMANN,

Foreman.

[Endorsed]: Filed April 9, 1924, at 4 o'clock and 45 minutes P. M. W. B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [28]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 11,010.

Conv. Viol. National Prohibition Act—Oct. 28, 1919.

THE UNITED STATES OF AMERICA

vs.

J. R. SOUZA.

JUDGMENT ON VERDICT OF GUILTY.

J. F. McDonald, Esquire, Assistant United States Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the information filed on the 20th day of April, 1924, charging him with the crime of violating National Prohibition Act; of his arraignment and plea of not guilty; of his trial and the verdict of the jury on the 9th day of April, 1924, to wit:

"We, the Jury, find as to the defendant at the bar, as follows;

Guilty on 1st Count.

Guilty on 2d Count.

Guilty on 3d Count.

ADOLPH C. BOLDEMANN,

Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown

or appearing to the Court, thereupon the Court rendered its judgment;

THAT WHEREAS, the said J. R. Souza having been duly convicted in this Court of the crime of violating National Prohibition Act;

IT IS THEREFORE ORDERED AND ADJUDGED that the said J. R. Souza pay a fine in the sum of Five Hundred ($500.00) Dollars as to the 1st Count of the information, pay a fine in the sum of Five Hundred ($500.00) Dollars as to the 2d Count of the information, and that he be imprisoned in the county jail, county of San Francisco, California, for a period of one (1) year as to the 3d Count of the information. [29]

Judgment entered this 9th day of April, A. D. 1924.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 16, *Judge* and Decrees, at page 176. [30]

In the Southern Division of the United States Court, in and for the Northern District of California.

No. 11,010.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN R. SOUZA,

Defendant.

MOTION FOR NEW TRIAL.

Now comes John R. Souza, defendant in the above-entitled case, and by his attorneys, Gilman & Harnden, moves the Court to set aside the verdict rendered herein and to grant a new trial of said cause, and for reasons therefor, shows the Court the following:

I.

That the verdict in said cause is contrary to law.

II.

That the verdict in said cause was not supported by the evidence in said case.

III.

That the evidence in said cause is insufficient to justify said verdict.

IV.

That the Court erred upon the trial of said cause in deciding questions of law arising during the course of the trial, and that the Court further erred in permitting the introduction of evidence over the

defendant's objections, which errors were duly excepted to.

Dated: at San Francisco, California, this 18th day of April, 1924.

GILMAN & HARNDEN,
Attorneys for Defendant. [31]

In the Southern Division of the United States Court, in and for the Northern District of California, First Division.

No. 11,010.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN R. SOUZA,
Defendant.

DEFENDANT'S POINTS AND AUTHORITIES ON MOTION FOR A NEW TRIAL AND IN ARREST OF JUDGMENT.

The Court erred in denying defendant's motion to exclude evidence on account of the illegal search of the defendant's home and the seizure of the property taken therefrom at the time of said search.

U. S. vs. Gouled, 255 U. S. 298.
U. S. vs. Amos, 255 U. S. 315.
U. S. vs. Silverthorn Lmbr. Co., 251 U. S. 115.
U. S. vs. Boyd, 116 U. S. 616.
U. S. vs. Mitchell, 274 Fed. 148.

U. S. vs. Falloco, 277 Fed. 75.

U. S. vs. Pardini, Court Files 10,922.

Amendments 4 and 5 of U. S. Constitution.

Section 6 of Act Supplemental to National Prohibition Act as approved Nov. 23, 1921, in Chapter 134, Statutes of 1921, Sections 13 and 19 of Articles 1 of the Constitution of the State of California.

In the case of U. S. vs. Pardini, Judge Dooling said:

"Under a State search-warrant the home of the defendant was searched by police officers for certain liquors theretofore stolen from one, Hart; the liquors sought were not found; but other liquor not stolen and belonging to defendant was found and seized. There was no warrant for such seizure nor any authority for same. The motion for return of the property so seized will be granted."

Veeder vs. U. S. (252 Fed. 414), C. C. of A. 7th Circuit.

U. S. vs. Ray and Schultz (275 Fed. 1004).

Giles vs. U. S., 284 Fed. 208, C. C. of Appeals, 1st District.

Ripper vs. U. S. 178 Fed. 24, C. C. of Appeals.

U. S. vs. Pittoto, 267 Fed. 603 D. C.

U. S. vs. Tureaud (C. C.), 20 Fed. 621.

U. S. vs. Armstrong, 275 Fed. 506 (D. C.).

U. S. vs. Yuck Kee, 281 Fed. 228. [32]

U. S. vs. Kelih, 277 Fed. 490.

U. S. vs. Palma, 295 U. S. 149.

284 Fed. 208.

288 Fed. 831.

U. S. vs. Jajesuric, 285 Fed. 789.

The evidence was insufficient to justify the verdict inasmuch as the premises searched constitute part of a private residence, and there was no proof of sale in violation of the National Prohibition Act, and such proof is necessary under the ruling of the last above cited cases.

The Court erred in allowing to be introduced in evidence the certain liquor seized at the time of the illegal search over defendant's objection.

The Court erred in allowing witnesses, who made the illegal search and seizure, to testify as to what they found by virture of said search and seizure over defendant's objection.

The Court erred in permitting the cross-examination, over defendant's objection, relative to matters not brought out on direct examination.

The Court erred in ruling, over the defendant's objection, that the defendant, when he took the stand in his own behalf, was subjected to be examined on any and every phase of the case, irrespective of whether such phases of the case, upon which cross-examination was sought, were even touched, upon the direct examination. Such is not the ruling of the case of United States vs. Digs et al., 220 Fed. 545, 242 U. S. Reports 470.

The Supreme Court said in considering the above case as follows:

> "We think the better reasoning supports the view sustained in the Court of Appeals in this

case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself, he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence in [33] which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it."

The Federal Court stated in deciding the above case as follows:

Federal Case states, page 551.

"We take this to mean that waiver of the constitutional privilege of a defendant in a criminal case is a complete waiver, and places the defendant in the same attitude as that of a defendant in a civil action who testifies in his own behalf."

Respectfully submitted,

GILMAN & HARNDEN,

Attorneys for John R. Souza.

[Endorsed]: Filed Apr. 19, 1924. Walter B. Maling, Clerk. By T. L. Baldwin, Deputy Clerk. [34]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 19th day of April, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable JOHN S. PARTRIDGE, District Judge.

No. 11,010.

UNITED STATES OF AMERICA

vs.

J. R. SOUSA.

MINUTES OF COURT—APRIL 19, 1924—ORDER DENYING MOTION FOR NEW TRIAL.

In this case E. D. Harnden, Esq., attorney for defendant, moved the Court for order for new trial, which motion the Court ordered denied. [35]

In the Southern Division of the United States Court, in and for the Northern District of California, First Division.

No. 11,010.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN R. SOUZA,

Defendant.

PETITION FOR WRIT OF ERROR.

Now comes the above-named defendant and by his attorneys, Gilman & Harnden, respectfully shows:

That heretofore and on the 9th day of April, 1924, a jury in the above-entitled court and cause returned and filed herein a verdict finding the above-named defendant guilty of the charge set forth in the indictment heretofore filed in the above-entitled court and cause, and against the defendant herein, charging him with the violation of the National Prohibition Act. That thereafter and on the 9th day of April, 1924, the defendant was by order and sentence of the above-entitled court and in said cause, sentenced to one year in county jail of San Francisco County, California, together with a fine of One Thousand Dollars ($1,000).

Your petitioner herein, the above-named defendant, feeling himself aggrieved by the said verdict and said judgment and the said sentence of the court entered herein as aforesaid, and by the orders and ruling of said Court and proceedings therein, now herewith petitions this Court for an order allowing him to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit under the laws of the United States and in accordance with the procedure of said [36] court in such cases made and provided to the end that the said proceedings as herein recited and as more fully set forth in the assignments of error presented here-

with may be reviewed and the manifest error appearing from the face of the record of said proceeding may be by said Circuit Court of Appeals corrected and that for such purpose a writ of error and citation thereon should issue as by the law and the ruling of the court as provided, whereupon the premises considered, your petitioner prays that the writ of error do issue to the end that the said proceedings of the United States District Court for the Northern District of California, First Division, may be reviewed and corrected, the said errors in said record being herewith assigned and presented herewith; that pending the final determination of said writ of error by said Appellate Court an order be made and entered herein that all further proceedings shall be suspended and stayed until the determination of said writ of error by said Court of Appeals.

GILMAN & HARNDEN,
Attorneys for Petitioner, the Plaintiff in Error.

[Endorsed]: Filed Apr. 19, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [37]

In the Southern Division of the United States Court, in and for the Northern District of California, First Division.

No. 11,010.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN R. SOUZA,

Defendant.

ASSIGNMENT OF ERROR.

Now comes the defendant in the above-entitled cause, John R. Souza, and plaintiff in error herein, in connection with his petition for a "Writ of Error" in this cause, assigns the following errors which said defendant avers occurred on the trial thereof, and upon which he relies to reverse the judgment and sentence entered herein as appears of record, to wit:

I.

The Court erred in denying the motion made by defendant and plaintiff in error during the trial of said cause to exclude from evidence certain property seized, and knowledge obtained, by federal prohibition officers as a result of a search and seizure made upon the basement of the home of this defendant and plaintiff in error; said motion for exclusion of evidence being based on the ground that the search-warrant, alleged to have been used

by the federal agents, was obtained on information and belief only, and without probable cause, and without proof of a sale of intoxicating liquor in or upon the premises of the defendant, which were searched, and upon which the seizure was made. To which ruling defendant and plaintiff in error duly excepted.

II.

The Court erred in denying the motion made by defendant and plaintiff in error, during the trial of said cause, to [38] exclude the testimony of federal agents, Shurtleff, Rinckel and McMahon, relative to any information or knowledge which they obtained by virtue of the search and seizure made upon defendant's property on the 9th day of March, 1922, for the reason that said search and seizure was made upon an unlawful search-warrant, and in violation of defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States. To which ruling the defendant and plaintiff in error duly excepted.

III.

The Court erred in denying defendant's and plaintiff in error's motion to exclude from evidence the property seized and the knowledge and information obtained, by the Federal agents, at the time of the search and seizure; said motion being made at the earliest possible moment after being advised, by the testimony of Agent Shurtleff, that the defendant's premises had been entered by virtue of a search-warrant, which search-warrant was obtained

upon information and belief and without proof of a sale of intoxicating liquor made on said premises, as provided under Section 25 of the National Prohibition Act, which premises the evidence showed to be occupied by defendant exclusively as defendant's home. To which ruling defendant and plaintiff in error duly excepted.

IV.

The Court erred in refusing to grant the motion of defendant and plaintiff in error, made during the trial, to quash the search-warrant, and for the release and dismissal of the defendant upon the ground that his constitutional rights had been violated; that the search was made of his home without proof being obtained that intoxicating liquor had been sold on said premises, or in said home, and on the further ground that [39] the search-warrant in this case was obtained upon information and belief, and without probable cause, thereby violating defendant's rights under the Fourth and Fifth Amendments to the Constitution of the United States. To which ruling the defendant and plaintiff in error duly excepted.

V.

The Court erred in denying the motion of the defendant and plaintiff in error to strike out all the evidence given by Federal Agents, Shurtleff, Rinckel and McMahon, upon the ground that said evidence was incompetent, irrelevant and immaterial, and is all secured in violation of defendant's rights guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States.

The substance of said evidence, as testified to by Federal Agent Shurtleff, that sometimes previous to March 9, 1922, he smelled the odor of distillation while on or near defendant's premises; that he did not smell said distillation at the time he made the raid; that he was informed that defendant was manufacturing intoxicating liquor on defendant's premises, and upon that information he secured a search-warrant for the basement or "dugout" located under the premises occupied by this defendant exclusively as defendant's home. The only knowledge that Federal Agents, Rinckel and McMahon had was obtained at the time of the search and seizure, March 9, 1922, and all that they testified to was relative to what took place at the time of the search and seizure, which was to the effect that they made an entrance into defendant's basement or "dugout," as sometimes termed by them, by virtue of crawling on their hands and knees under the defendant's house and then digging a hole through the wall of said basement through which hole they entered the basement and found therein a still, some [40] mash and intoxicating liquor, which still and intoxicating liquor was taken with them. At the time of the trial they identfied the liquor exhibited by the Government, in this case, as part of that taken from defendant's premises on March 9, 1922. To said ruling on said motion defendant and plaintiff in error duly excepted.

VI.

The Court erred in admitting evidence over de-

fendant's objection relative to other visits to defendant's premises made by Federal Agents Shurtleff on May 9, 1921.

VII.

The Court erred in permitting the prosecuting attorney to cross-examine defendant, relative to matters which had not been touched upon in defendant's direct examination, over defendant's objection to said cross-examination. In making said ruling the Court said (Transcript, page 19): "The Supreme Court, in a case from this district, the case of Diggs and Caminetti, held distinctly that when a defendant goes on the stand in his own behalf, he opens up the whole subject." To which ruling the defendant and plaintiff in error duly excepted.

VIII.

The Court erred in overruling defendant's objection to the prosecuting attorney's cross-examination of the defendant, relative to defendant's arrest in 1921, there being no testimony introduced by the defendant, on direct examination, relative to any prior arrest or anything pertaining thereto, or in any way connected therewith. To which ruling defendant and plaintiff in error duly excepted.

IX.

The Court erred in personally cross-examining the defendant, [41] over defendant's objection, relative to matters not touched upon, or in any way related to, or pertaining to anything testified to by the defendant on direct examination. To which

ruling defendant and plaintiff in error duly excepted.

X.

The Court erred in submitting this cause to the jury for the reason that there was no evidence upon which a conviction could be sustained, for the reason that no part of the mash, still or intoxicating liquor, alleged to have been seized at the time of the raid, was introduced in evidence.

XI.

The Court erred in failing to instruct the jury relative to the defendant being presumed innocent.

XII.

The Court erred in denying defendant's motion for a new trial herein, which motion was made in due time as the jury had returned a verdict of guilty upon the following grounds:

(1) That the verdict in said cause is contrary to law.

(2) That the verdict in said cause was not supported by the evidence in said case.

(3) That the evidence in said cause is insufficient to justify said verdict.

(4) That the Court erred upon the trial of said cause in deciding questions of law during the course of the trial, and that the Court further erred in permitting the introduction of evidence over defendant's objections, which errors were duly excepted to.

XIII.

The Court erred in imposing the sentence herein for the [42] reasons above set forth.

WHEREFORE, the defendant and plaintiff in error, John R. Souza, prays that the judgment of said Court be reversed, and this cause remanded to the said District Court with directions to dismiss the same, and discharge the said defendant and plaintiff in error from custody and exonerate the sureties of defendant's bail bond.

JOHN R. SOUZA,
Defendant.

GILMAN & HARNDEN,
Attorneys for Defendant.

Due service and receipt of a copy of the within assignment of errors is hereby admitted this 5 day of June, 1924.

J. T. WILLIAMS,
Attorney for Pff.

[Endorsed]: Filed at 1 o'clock and 15 min. P. M. Jun. 5, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [43]

In the Southern Division of the United States Court, in and for the Northern District of California, First Division.

No. 11,010.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN R. SOUZA,
Defendant.

ORDER ALLOWING WRIT OF ERROR.

On this 19th day of April, 1924, came the defendant, John R. Souza, and filed herein and presented to the Court his petition praying for the allowance of the writ of error intended to be urged by him, which petition was accompanied by an assignment of errors relied upon by the defendant, praying also that the transcript of the record and proceeding and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit and that such order and further proceedings may be had as may be proper in the premises. That all further proceedings shall be stayed until the determination of the said writ of error by the said Circuit Court of Appeals, now in consideration of said petition and being fully advised in the premises, the Court does hereby allow the said writ of error, and

IT IS HEREBY ORDERED that the defendant be admitted to bail pending the decision upon said writ of error in the sum of Twenty-five Hundred ($2500) Dollars, the bond for costs for the writ of error is hereby fixed in the sum of Two Hundred and Fifty ($250) Dollars for the defendant and all further proceedings are hereby suspended herein until the determination of said writ of error by said Circuit Court of Appeals.

JOHN S. PARTRIDGE,
United States District Judge. [44]

Dated: San Francisco, California, this 19th day of April, 1924.

[Endorsed]: Filed Apr. 19, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [45]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk U. S. District Court, for the Northern District of California, do hereby certify that the foregoing 45 pages, numbered from 1 to 45, inclusive, contain a full, true and correct transcript of the record and proceedings, in the case of United States of America vs. John R. Souza, No. 11,010, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein) and the instructions of the attorney for defendant and plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of sixteen dollars and forty-five cents ($16.45) and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error, return to writ of error, and original citation on writ of error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said Ditrict Court, this 11th day of October, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [46]

WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, Southern Division, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America, defendant in error, a manifest error hath happened, to the great damage of the said John R. Souza, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same

at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

WITNESS, the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 15th day of August, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern Dist. of California.

By C. M. Taylor,
Deputy Clerk.

Allowed by:

JOHN S. PARTRIDGE,
U. S. District Judge.

Service of within writ of error admitted this 15th day of August, 1924.

STERLING CARR,
United States Attorney.
By GARTON D. KEYSTON,
Asst. U. S. Atty.

[Endorsed]: No. 11,010. United States District Court for the Northern District of California, Southern Division. United States of America, Plaintiff in Error, vs. John R. Souza, Defendant in

Error. Writ of Error. Filed Aug. 15, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [47]

RETURN TO WRIT OF ERROR.

The answer of the Judges of the United States District Court, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is within made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 15th day of August, A. D. 1924, duly lodged in the case in this court for the within named defendant in error.

By the Court.

[Seal] WALTER B. MALING,
Clerk, U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [48]

CITATION ON WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States, to United States of America, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error duly issued and now on file in the Clerk's Office of the United States District Court for the Northern District of California, Southern Division, wherein John R. Souza is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable JOHN S. PARTRIDGE, United States District Judge for the Northern District of California, this 15th day of August, A. D. 1924.

JOHN S. PARTRIDGE,
United States District Judge.

United States of America,—ss.

On this 15th day of August, in the year of our Lord one thousand nine hundred and twenty-four, personally appeared before me, ———, the sub-

scriber, ———, and makes oath that he received a true copy of the within citation on Aug. 15, 1924.

STERLING CARR,
United States Attorney.
By GARTON D. KEYSTON,
Asst. U. S. Atty.

[Endorsed]: No. 11,010. United States District Court for the Northern District of California. United States of America, Plaintiff in Error, vs. John R. Souza, Defendant in Error. Citation on Writ of Error. Filed Aug. 15, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [49]

[Endorsed]: No. 4361. United States Circuit Court of Appeals for the Ninth Circuit. John R. Souza, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Received October 11, 1924.

F. D. MONCKTON,
Clerk.

Filed October 16, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.
By Paul P. O'Brien,
Deputy Clerk.

No. 4361

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit //

JOHN R. SOUZA,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

GILMAN & HARNDEN,
Henshaw Building, Oakland,
Attorneys for Plaintiff in Error.

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 4361

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN R. SOUZA,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

The plaintiff in error was charged by information with violations of the "National Prohibition Act." The information contained three counts:

The first count charged plaintiff in error with having in his possession, on March 9, 1922, at 2202 E. 17th Street, Oakland, County of Alameda, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, certain property designed for the manufacture of liquor, to-wit:

1—50 Gallon Still,
12—50 Gallon Barrels of Mash,
1—Pump,

2—Electric Motors,
1—Electric Fan,

then and there intended for use in violating Title (11) of the Act of Congress of October 28, 1919, to-wit: "The National Prohibition Act," in the manufacture of intoxicating liquor containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes.

The second count charged the plaintiff in error on the above mentioned date with wilfully and unlawfully possessing certain intoxicating liquor, to-wit:

50—Gallons Jackass Brandy,

then and there containing one-half of one per cent or more of alcohol by volume, which was then and there fit for use for beverage purposes, in violation of Section 111 of Title 11 of the said "National Prohibition Act."

The third count charged the plaintiff in error on the above mentioned date with wilfully and unlawfully manufacturing certain intoxicating liquor, to-wit:

50—Gallons Jackass Brandy,

then and there containing one-half of one per cent of alcohol by volume, which was then and there fit for use for beverage purposes, in violation of Section 111 of Title 11 of said "National Prohibition Act. (Trans. Rec. pages 2 to 7.)

The information was verified and filed by the United States Attorney on April 20, 1922. To the above information the plaintiff in error regularly entered a plea of "not guilty" on May 6, 1922. (Trans. Rec. page 8.)

On the 9th day of April, 1924, the plaintiff in error was tried before a jury, and the jury returned a verdict on said day finding the plaintiff in error guilty of the charges set forth in said information, said verdict being as follows:

> "We, the Jury, find, as to the defendant at the bar, as follows:
> Guilty on First Count,
> Guilty on Second Count,
> Guilty on Third Count.
> Adolph C. Boldemann,
> Foreman."
>
> (Trans. Rec. page 32.)

Thereupon the Court, on April 9, 1924, sentenced the plaintiff in error to pay a fine of five hundred dollars ($500) on each of the first two counts of the information, and the third count to be imprisoned for a period of one (1) year. (Trans. Rec. page 33.)

Judgment entered April 9, 1924.

A writ of error was thereupon sued out by plaintiff in error to review the judgment and proceedings in the trial Court.

II.

SPECIFICATION OF THE ERRORS RELIED UPON.

1.

The Court erred in denying the motion made by plaintiff in error during the trial of said cause to exclude from evidence certain property seized, and knowledge obtained, by Federal Prohibition Officers as a result of a search and seizure made upon the basement of the home of plaintiff in error; said motion for exclusion of evidence being based on the ground that the search warrant, alleged to have been used by the Federal Agents, was obtained on information and belief only, and without probable cause, and without proof of a sale of intoxicating liquor in or upon the premises of plaintiff in error, and upon which the seizure was made. To which ruling plaintiff in error duly excepted.

2.

The Court erred in denying the motion made by plaintiff in error, during the trial of said cause, to exclude from evidence the testimony of Federal Agents, Shurtleff, Rinckel and McMahon, relative to any information or knowledge which they obtained by virtue of the search and seizure made upon plaintiff in error's property on the 9th day of March, 1922, for the reason that said search and seizure was made upon an unlawful search warrant, and in violation of plaintiff in error's rights under the Fourth and Fifth Amendments to the Constitu-

tion of the United States. To which ruling the defendant and plaintiff in error duly excepted.

3.

The Court erred in denying plaintiff in error's motion to exclude from evidence the property seized and the knowledge and information obtained, by the Federal Agents, at the time of the search and seizure; said motion being made at the earliest possible moment after being advised, by the testimony of Agent Shurtleff, that the plaintiff in error's premises had been entered by virtue of a search warrant, which search warrant was obtained upon information and belief and without proof of a sale of intoxicating liquor made on said premises, as provided under Section 25 of the National Prohibition Act, which premises the evidence showed to be occupied by plaintiff in error exclusively as plaintiff in error's home. To which ruling plaintiff in error duly excepted.

4.

The Court erred in refusing to grant the motion of plaintiff in error, made during the trial, to quash the search warrant, and for the release and dismissal of the plaintiff in error upon the ground that his constitutional rights had been violated; that the search was made of his home without proof being obtained that intoxicating liquor had been sold on said premises, or in said home, and on the further ground that the search warrant in this case was

obtained upon information and belief, and without probable cause, thereby violating plaintiff in error's rights under the Fourth and Fifth Amendments to the Constitution of the United States. To which ruling the plaintiff in error duly excepted.

5.

The Court erred in denying the motion of the plaintiff in error to strike out all the evidence given by Federal Agents, Shurtleff, Rinckel and McMahon, upon the ground that said evidence was incompetent, irrelevant and immaterial, and was all secured in violation of plaintiff in error's rights guaranteed by the Fourth and Fifth Amendments to the Constitution of the United States. The substance of said evidence, as testified to by Federal Agent Shurtleff, that sometime previous to March 9, 1922, at night, he smelled the odor of distillation while on or near plaintiff in error's premises; that he did not smell said distillation at the time he made the raid; that he was informed that plaintiff in error was manufacturing intoxicating liquor on plaintiff in error's premises, and upon that information he secured a search warrant for the basement or "dugout" located under the premises occupied by plaintiff in error exclusively as plaintiff in error's home. The only knowledge that Federal Agents Rinckel and McMahon had was obtained at the time of the search and seizure, March 9, 1922, and all that they testified to was relative to what took place at the time of the search and

seizure, which was to the effect that they made an entrance into plaintiff in error's basement or "dugout", as sometimes termed by them, by crawling on their hands and knees under the plaintiff in error's house and then digging a hole through the wall of said basement through which hole they entered the basement and found therein a still, some mash and intoxicating liquor, which still and intoxicating liquor were taken with them. At the time of the trial they identified the liquor exhibited by the Government, in this case, as part of that taken from plaintiff in error's premises on March 9, 1922. To said ruling on said motion plaintiff in error duly excepted.

6.

The Court erred in admitting evidence over plaintiff in error's objection relative to other visits to plaintiff in error's premises made by Federal Agent Shurtleff prior to May 9, 1921.

7.

The Court erred in permitting the prosecuting attorney to cross-examine plaintiff in error relative to matters which had not been touched upon in defendant's direct examination, over defendant's objection to said cross-examination. In making said ruling the Court said (Trans. Rec. page 19):

> "The Supreme Court, in a case from this District, the case of Diggs and Caminetti, held distinctly that when a defendant goes on the stand in his own behalf, he opens up the whole subject."

8.

The Court erred in overruling plaintiff in error's objection to the prosecuting attorney's cross-examination of the plaintiff in error, relative to plaintiff in error's arrest in 1921, there being no testimony introduced by the plaintiff in error, on direct examination, relative to any prior arrest or anything pertaining thereto, or in any way connected therewith, to which ruling plaintiff in error duly excepted.

9.

The Court erred in personally cross-examining the plaintiff in error over plaintiff in error's objection, relative to matters not touched upon, or in any way related to, or pertaining to anything testified to by the plaintiff in error on direct examination. To which ruling plaintiff in error duly excepted.

10.

The Court erred in submitting this cause to the jury for the reason that there was no evidence upon which a conviction could be sustained, for the reason that no part of the mash, still or intoxicating liquor, alleged to have been seized at the time of the raid, was introduced in evidence.

11.

The Court erred in failing to instruct the jury relative to the plaintiff in error being presumed innocent.

12.

The Court erred in denying plaintiff in error's motion for a new trial herein, which motion was made in due time as the jury had returned a verdict of "guilty" upon the following grounds:

(1) That the verdict in said cause is contrary to law.

(2) That the verdict in said cause was not supported by the evidence in said case.

(3) That the evidence in said cause is insufficient to justify said verdict.

(4) That the Court erred upon the trial of said cause in deciding questions of law during the course of the trial, and that the Court further erred in permitting the introducing of evidence over plaintiff in error's objections, which errors were duly excepted to.

13.

The Court erred in imposing the sentence herein for the reasons above set forth.

III.

ARGUMENT.

THE COURT ERRED IN ADMITTING IN EVIDENCE PROPERTY TAKEN FROM THE PLAINTIFF IN ERROR'S PRIVATE DWELLING AND INFORMATION OBTAINED IN VIOLATION OF THE FOURTH AND FIFTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES, ON ACCOUNT OF UNREASONABLENESS OF THE SEARCH AND SEIZURE, IN THAT THE FEDERAL OFFICERS, IN SEARCHING THE PRIVATE DWELLING OF THE PLAINTIFF IN ERROR, WERE OPERATING UNDER AN ILLEGAL SEARCH WARRANT IN MAKING SEARCH OF SAID PRIVATE DWELLING OR ANY PORTION THEREOF, AND IN SEIZING PROPERTY LOCATED THEREIN.

(Assignment of Errors Nos. I, II, III and IV, Trans. Rec. pages 42-43 and 44.)

The above point is raised by plaintiff in error's motion that the evidence given by Prohibition Agent Shurtleff, as well as the other Prohibition Agents who testified in said cause, be stricken out on the ground that said evidence was secured in violation of plaintiff in error's rights granted him by the Fourth and Fifth Amendments to the Constitution of the United States, and in the plaintiff in error's exception being noted to the Court's denial of said motion;

By plaintiff in error's objection and exception to the Court's ruling compelling the plaintiff in error to testify to matters other than that for which he took the witness stand to prove, to-wit: The residence of himself, of his wife and family at the premises mentioned in the action (Trans. Rec. pages 23-24 and 25);

By defendant in error's failure to offer in evidence the alleged Fifty (50) Gallon Still; Twelve Fifty Gallon Barrels of Mash; One Pump; Two Electric Motors and One Electric Fan.

By plaintiff in error's objection to the introduction in evidence of any liquor seized upon said premises upon the ground that the same was taken in violation of plaintiff in error's Constitutional rights and to his exception to the Court's order overruling said objection.

Upon plaintiff in error's motion to quash the search warrant and for the release and dismissal of the plaintiff in error upon the ground that his Constitutional rights had been violated, and further, upon the ground that the search warrant issued in this matter was obtained and issued upon information and belief, and that a search was made of the plaintiff in error's home without proof being obtained that liquor was sold on the premises, or in the home, and that evidence received under and by virtue of said search warrant be excluded, which motion the Court denied, and to which plaintiff in error duly excepted. (Trans. Rec. page 22.)

Upon plaintiff in error's motion to exclude from evidence any property, liquor, articles or material and everything that may have been found upon the premises of plaintiff in error, upon the ground and upon the theory that the search warrant issued in this matter was based upon information and belief, and that there was no probable cause for

its issuance under the testimony introduced in this matter; and that there was no showing of any sale of liquor upon the premises; that the premises were a private dwelling occupied by the plaintiff in error and his family as such, upon the ground that the plaintiff in error's Constitutional rights and privileges were violated, and that there was an illegal and invalid search of his premises and his home, to which motion and objection the Court overruled and plaintiff in error excepted. (Trans. Rec. pages 17-18 and 20.)

The question of the illegality of the search and seizure was raised by plaintiff in error's motion to exclude the evidence seized by the Federal Agents in this matter and by his motion to quash the search warrant issued in said matter to exclude from evidence any property or things seized by virtue of said search warrant in conformity with the rules laid down by the United States Supreme Court in the cases of

Weeks v. United States, 232 U. S. 388;
Gouled v. United States, 255 U. S. 289, and
Amos v. United States, 255 U. S. 315,

and were duly and regularly presented to the Trial Court.

The premises which were searched and a seizure made therefrom was a private dwelling and part of the dwelling of the plaintiff in error. Plaintiff in error in his testimony stated:

> "My home is a two story house with a basement underneath. There is an entrance to the basement on the side of the house, and also through a little trap door in one of the rooms on the second floor. The basement may be entered from either way. A fence surrounds the house, and the basement is directly under the house and within the space enclosed by the walls of the house. I have not sold any intoxicating liquor on the premises." (Trans. Rec. pages 22 and 23.)

And again in the testimony of Federal Agent Shurtleff, this statement is made:

> "The premises are located at 2202 E-17th Street, Oakland, California. At that time Mr. Souza resided there. I think I see his wife, see a lady there. I think it was his wife; I had a conversation with her. I think it is a home residence. It is not very far from the street, approximately five or ten feet on one side and maybe twenty on the end, corner house; there is a lawn around it and a fence around the lawn. We entered through a little door on the east side of the house from the outside of the house. We got into the yard through the front gate and walked around to the side of the house. A little door on the side of the house led under the house, the house proper. This dugout, or cellar or basement is a little below the house proper, underneath the house proper and within the fence that encircled the house. We were compelled, in order to go into the premises, to go through the gate, the front gate and enter the premises." (Trans. Rec. pages 14-15 and 16.)

There is no denial on behalf of the government that the premises occupied by plaintiff in error were

at all times a private dwelling; the Federal Agent's testimony just quoted clearly and explicitly admits that the premises were a private dwelling and occupied by the plaintiff in error and his family, at the time of the search and seizure herein mentioned.

The testimony of D. W. Rinckel, Federal Agent, clearly shows, by the following statement, that the premises were a private dwelling:

> "Accompanied by Agent Shurtleff on the 9th day of March, we entered the front gate at 2202 E-17th Street, Oakland, California, walked around to the east side and crawled under the house and a small door was there—about a two by four door and went to the front of the house. The defendant was not there at the time—he was subsequently arrested. The premises as far as I know were occupied as a private dwelling; there was a woman, his wife came down and asked us what our business was there. We showed her the search warrant and pursuant to that search warrant we searched the premises. Witness never purchased any liquor on the premises and does not know of any liquor being sold there to his knowledge. These premises are occupied as a private residence by the defendant." (Trans. Rec. pages 18-19 and 20.)

Thus there can be no question that the premises occupied by the plaintiff in error were a private dwelling within the meaning of Section 25 of the "National Prohibition Act." Further, there can be no question that the dugout, cellar or basement which was located immediately beneath the house proper, and required the opening of a door in the

side of the house before entrance could be obtained to the said dugout, cellar or basement, was a part of the dwelling house itself and did not constitute a separate building or separate place, as the evidence clearly shows that said premises were entirely used by the plaintiff in error and his family. The private dwelling and basement were located on one lot, the basement is a part of the building, and no other person had control over it but the plaintiff in error and his family. No person other than the plaintiff in error and his family had access to it. It was necessary for the Federal Agents to open a gate and enter upon the private property of the plaintiff in error by going into his yard and then trespassing over said yard or property until they had reached the side of the house, at which place it was further necessary to open a door at the side of the house, which said door was a part of the house proper, and to then go for some distance and enter another door to enter into the basement, and under the decisions we believe that the weight of authority is to the effect that the basement and the buildings within an enclosure or fence or yard constitute a part of the dwelling itself.

What Constitutes a Dwelling?

> "The term 'mansion' or dwelling or dwelling house comprehends all the out buildings which are parcel thereof, though they be not contiguous to it. All buildings within the same curtilage or common fence and used by the same family are considered by the law as parcel

> of the mansion. If they are separated from the dwelling house and are not within the common fence, though occupied by the same owner, the question whether they are parcel of the mansion or not is a question for the jury upon the evidence."
>
> 3 *Greenleaf,* Section 8.

In the case of *Amos v. United States,* 255 U. S. 314, Judge Clark assumed that the store connected with the defendant's home was within his curtilage.

It was decided in *Curran's* case, 7 Gratt, 48 Va. 630,

> "Arson is the burning of a dwelling house feloniously, the term 'Dwelling house' embraces the dwelling house proper, kitchen, meat house, dairy offices, barn and stable, and all other out buildings within the curtilage of the dwelling house."

But upon the subject of the dwelling and its curtilage the two most instructive cases are, *United States v. Kramer,* 286 Fed. page 975, decided with a number of other cases, in *United States v. Kaplan,* in 286 Fed. 963, and the case of *Bare v. The Commonwealth,* 122 Va. 783, 94 S. E. 172; these cases are of particular importance because they analyze a dwelling, under prohibition laws.

The case of *United States v. Kramer* (supra), is as follows:

> "It is held that the barn wherein the automobile was standing at the time certain papers were removed therefrom was within the curtilage and the papers taken from the automobile shall be returned."

In the case of *Bare v. The Commonwealth,* 122 Va. 783, 94 S. E. 172,

> "As construed by the Courts from the earliest to the latest times, the words dwelling or dwelling house have been construed to include not only the main house, but all of the cluster of buildings convenient for the occupants of the premises generally described as within the curtilage."

Lord Chatham tersely stated in the House of Commons in April, 1766, the true definition of the dwelling and the respect demanded by it when he declared:

> "Every man's house is called his castle. Why? Because it is surrounded by a moat, or defended by a Wall? No. It may be a straw-built hut, the wind may whistle around it, the rain may enter it, but the king can not."

Were the premises in question a dwelling under Section 25 of the National Prohibition Act?

The Legislature in providing for the enforcement of a law may restrict the accepted meaning of the word "dwelling" but we respectfully submit that Congress did not do so in enacting Section 25 of the "National Prohibition Act." It made five exceptions which are herein set out.

> "No search warrant shall issue to search any private dwelling, occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purposes such as a store,

shop, saloon, restaurant, hotel, or boarding house."

Act October 28, 1919, c. 85 Title 11, Sec. 25; *Barnes Fed. Code* (Cum. Suppl. 1923) pages 739, 740.

Obviously the premises in question were not a store, shop, saloon, restaurant, hotel or boarding house, and therefore remains within the generally accepted definition of the term "dwelling."

THE SEARCH AND SEIZURE IN THE INSTANT CASE WAS ILLEGAL—AND UNREASONABLE, BECAUSE THE PLAINTIFF IN ERROR'S PREMISES WERE SEARCHED AND THE SEIZURE MADE THEREFROM WITHOUT PROOF OF SALE OF LIQUOR UPON THE PREMISES IN QUESTION, AND THE SEARCH WARRANT, AND THE AFFIDAVIT UPON WHICH SAID SEARCH WARRANT WAS BASED, WAS ISSUED UPON INFORMATION AND BELIEF, AND WITHOUT PROBABLE CAUSE. THE SEARCH WAS IN VIOLATION OF THE FOURTH AND FIFTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In reviewing the evidence concerning the search and seizure in the instant case, these two amendments should be kept in mind.

The Court's attention is called to the testimony of Federal Agent A. R. Shurtleff (Trans. Rec. pages 16 and 17), wherein the following statement is made:

"I say we entered there pursuant to that search warrant. I or any other person to my knowledge did not purchase or buy any liquor from the defendant there; not that I know of.

There was not a sale of intoxicating liquor upon the premises to my individual knowledge. I smelled the odor of distillation there sometime previous to the raid, previous to March 9, 1922; I was told that there was liquor being manufactured on the premises. Upon that information and upon the information of my senses; that is, my sense of smell, I went to the Commissioner and had a search warrant issued for the basement, this dugout. This hole down there was eight by ten or ten by twelve, something like that.

Mr. GILMAN. And did you know that there was liquor being manufactured on the premises?

Mr. SHURTLEFF. I was told so.

Mr. GILMAN. You were told so, and upon that information, and upon the information of your senses, that is, your sense of smell, you went to the Commissioner and had a search warrant issued. Is that correct?

WITNESS. Yes, for the basement—for this dugout, yes."

It is clearly evident from the foregoing that the search warrant issued in this matter was issued entirely upon information and belief and without probable cause, and consequently the search and seizure made, by virtue thereof, was in violation of the plaintiff in error's Constitutional rights and privileges.

We believe that the following authorities justify us in declaring that the search and seizure in the instant case was unconstitutional and illegal:

Temperani v. United States, 299 Fed. 365;

Gouled v. United States, 255 U. S. 298;

Silverthorne Lumber Co. v. United States, 251 U. S. 155;
Weeks v. United States, 232 U. S. 383;
Boyd v. United States, 116 U. S. 616;
Miucki v. United States, 289 Fed. 47 (C. C. A. 7th Circuit);
Pressley v. United States, 289 Fed. 477 (C. C. A. 5th Circuit);
Jozwich v. United States, 288 Fed. 831 (C. C. A. 7th Circuit);
Ganci v. United States, 287 Fed. 60 (C. C. A. 2nd Circuit);
Salata v. United States, 286 Fed. 125 (C. C. A. 6th Circuit);
Murphy v. United States, 285 Fed. 801 (C. C. A. 7th Circuit);
Snyder v. United States, 285 Fed. 1 (C. C. A. 4th Circuit);
Woods v. United States, 279 Fed. 706 (C. C. A. 4th Circuit);
Giles v. United States, 284 Fed. 208 (C. C. A. 1st Circuit);
Berry v. United States, 275 Fed. 680 (C. C. A. 7th Circuit);
Holmes v. United States, 275 Fed. 49 (C. C. A. 4th Circuit);
Dukes v. United States, 275 Fed. 142 (C. C. A. 4th Circuit);
Veeder v. United States, 252 Fed. 415 (C. C. A. 7th Circuit);

Ripper v. United States, 178 Fed. 24 (C. C. A. 8th Circuit);
United States v. Case, 286 Fed. 627;
United States v. Sievers, 292 Fed. 394;
United States v. Jajeswich, 285 Fed. 789;
United States v. Rembert, 284 Fed. 997;
United States v. Falloco, 277 Fed. 75;
United States v. Connolly, 275 Fed. 509;
United States v. Ross, 277 Fed. 75;
United States v. Mitchell, 274 Fed. 128;
United States v. Kelih, 272 Fed. 484;
United States v. Abrams, 230 Fed. 313;
United States v. McHie, 194 Fed. 894;
United States v. Wong Quong Wong, 94 Fed. 832;
Hughes v. The State, 238 So. W. 588 (Tenn.);
Douglas v. The State, 110 S. E. 168 (Ga.);
People v. Marxhausen, 171 N. W. 557 (Mich.).

In the leading case of *Gouled v. United States,* 255 U. S. 298, the learned Justice says, on page 308 of the reports:

> "The wording of the Fourth Amendment implies that search warrants were in familiar use, when the Constitution was adopted, and plainly, that when issued 'upon probable cause', supported by oath or affirmation and particularly describing the place to be searched and the persons and things to be seized,' searches and seizures made under them are to be regarded as not unreasonable, and therefore not prohibited by the Amendment. Searches and

seizures are as Constitutional under the Amendment when made under valid search warrants as they are Unconstitutional because unreasonable when made without them—the permission of the Amendment has the same Constitutional warrant as the prohibition has, and the definition of the former restrains the scope of the latter."

And on page 304 thereof, the same Judge said:

"It would not be possible to add to the emphasis with which the framers of our Constitution and this Court (in Boyd v. United States, 116 U. S. 616; 25 L. Ed. 746, 6 Sup. Ct. Rep. 524, in Weeks v. United States, Ann. Cas. 1915 C. 1177, and in Silverthorn Lumber Co. v. United States, 251 U. S. 385, 64 L. Ed. 319, 40 Sup. Ct. Rep. 182) have declared the importance to political liberty and to the welfare of our Country of the due observance of the rights guaranteed under the Constitution by these two Amendments. The effect of the decisions cited is: That such rights are declared to be indispensable to the 'full enjoyment of personal security, personal liberty, and private property;' that they are to be regarded of the very essence of constitutional liberty; and that the guaranty of them is as important and as imperative as are the guarantees of other fundamental rights of the individual citizen,—the right to trial by jury, to the writ of habeas corpus, and to due process of law. It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of Courts or by well-intentioned but mistakenly over-zealous executive officers."

And again on page 306, the Court said:

> "Is the admission of such paper in evidence against the same person when indicted for crime, a violation of the Fifth Amendment?
>
> "Upon authority of the Boyd case, supra, this second question must also be answered in the affirmative. In practice the result is the same, to one accused of crime, whether he is obliged to supply evidence against himself or whether such evidence be obtained by an illegal search of his premises and seizure of his private papers. In either case he is the unwilling source of the evidence and the Fifth Amendment forbids that he shall be compelled to be a witness against himself."

The authorities cited above approach the principles here involved from various angles. The Gouled, Silverthorne Lumber Company and Woods cases treat of an illegal seizure from a man's private office. The Boyd case treats of an illegal production of papers belonging to the defendant. The Weeks, Amos, Jozwich, Ganci, Pressley and Mitchell cases treat of illegal searches and seizures from the homes of defendants. The Amos, Murphy, Salata and Miucki cases, treat of searches and seizures from the places of business of the accused. The Berry case is authority for the proposition that Federal Agents, without a search warrant have no right to search the ice box of a soft drink parlor. The Snyder case forbids the search of the person, even though a bottle was seen protruding from his pocket, without the authorization of a search warrant. The Falloco, Ross, Kelih and Jajeswich cases

forbid a search of basements of dwelling houses of the accused, upon the statement of an officer who claimed to have detected the odor of illicit distilling from those places. The Wong Quong Wong case protected the mail of a Chinaman accused of crime in the hands of the Marshal. The State cases cited apply the same principles in the same manner.

A search of and seizure from a private dwelling is illegal under all circumstances without a search warrant based upon an affidavit setting forth a sale of intoxicating liquor from said private dwelling.

In addition to the Fourth and Fifth Amendments of the Constitution, Congress, on two different occasions, restricted the search of dwellings by the enactment of two different safeguards, the first was enacted at the time of the passage of the National Prohibition Act and is generally referred to as Section 25 of said act, it is:

> "No search warrant shall issue to search any private dwelling occupied as such unless it is being used for the unlawful sale of intoxicating liquor, or unless it is in part used for some business purpose, such as a store, shop, saloon, restaurant, hotel or boarding house. The term 'private dwelling' shall be construed to include the room or rooms used and occupied not transiently but solely as a residence in an apartment house, hotel or boarding house."

Congress in its determination to protect the dwelling from unlawful and illegal searches, on the 23d

day of November, 1921, in the act generally referred to as the Act Supplemental to the National Prohibition Act, passed this law:

> "Any officer, agent, or employee of the United States, engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling, as defined in the National Prohibition Act, and occupied as such dwelling without a warrant directing such search, or who while so engaged shall without a search warrant maliciously and without reasonable cause search any other building or property, shall be guilty of a misdemeanor and upon conviction thereof shall be fined for a first offense not more than one thousand dollars, and for a subsequent offense not more than one thousand dollars or imprisonment not more than one year, or both such fine and imprisonment."
>
> (Act November 23, 1921, C. 134 Sec. 6, 42 Stat.);
>
> *Barnes Fed. Code* (Cum. Suppl. 1923), page 750.

A slight study of the two last mentioned laws leaves no doubt as to the intention of Congress. Congress intended to protect the dwelling and punish those who violated the Fourth Amendment to the Constitution of the United States and Section 25 of the "National Prohibition Act." It will be noted that there are no ifs or ands set forth in the law last referred to. No exceptions are made at all. Congress did not intend to delegate to a petty officer the right to determine for himself whether or not

he should enter a home. The usual devices for evading the Fourth and Fifth Amendments to the Constitution, by the positive and unequivocal words of the enactment are forbidden. Congress says in effect, that a Federal Officer cannot go into a home at all without a search warrant and that he can not obtain a search warrant to enter a home unless he produces before the judge or officer issuing the search warrant, clear and positive proof that a sale of intoxicating liquor was made by the occupant of the premises sought to be searched, and said proof must be supported by an oath.

There are no Supreme Court cases which pass upon Section 25 of the "National Prohibition Act" or the Act Supplemental to the National Prohibition Act, but the Federal Reports abound with Circuit and District Court opinions interpreting particularly Section 25 of the "National Prohibition Act."

Pressley v. United States, 289 Fed. 477 (5th Circuit);

Miucki v. United States, 289 Fed. 47 (7th Circuit);

Jozwich v. United States, 288 Fed. 831 (7th Circuit);

Ganci v. United States, 287 Fed. 60 (4th Circuit);

Holmes v. United States, 275 Fed. 49 (4th Circuit);

United States v. Sievers, 292 Fed. 394;

United States v. Case, 286 Fed. 627;

United States v. Jajeswich, 285 Fed. 789;
United States v. Rembert, 284 Fed. 997;
United States v. Falloco, 277 Fed. 75;
United States v. Ross, 277 Fed. 75;
United States v. Connolly, 275 Fed. 509;
United States v. Mitchell, 274 Fed. 128;
United States v. Kelih, 272 Fed. 484.

In the recent case of *Jozwich v. United States,* cited supra, the Court says on page 832:

> "The affidavit in this case, assuming it was duly sworn to, was defective, in that it failed to set forth facts from which the commissioner could find that the liquor alleged to have been illegally manufactured was, under the statute, seizable. The sole support for the warrant's issuance must be found in the statement:
>
> " 'Illicit liquor is being manufactured on the premises and in a house located on the rear part of lot at 1934 Trendley Avenue, being the premises of Joe Jozwich.' "
>
> " 'The manufacture of illicit liquor in a house' does not bring the case within the language of the statute."

Section 25 of Title 11 of the National Prohibition Act reads:

(Citing Section.)

> " 'It is apparent from the reading of this section that the Congress had in mind the distinction which has always existed (so far as search is concerned) between a dwelling house and a place of business. Since the time of Otis, back in colonial days, the dwelling house, occupied as such, has been recognized as the owner's "castle," and has not been the legitimate object of raids by government officials,

> unless the showing made before the commissioner disclosed added facts not necessary in case the alleged illegal transaction occurred in a place of business.'"

In the case of *United States v. Jajeswich,* cited supra, the Court says, on page 789:

> "The only facts upon which probable cause could be predicated were that an odor of liquor and mash emanated from the premises and a quantity of used mash was visibly present thereon. There was no statement in the affidavit or warrant indicating that the premises were used for the unlawful sale of intoxicating liquors, or were in part used as a store, shop, saloon, restaurant, hotel or boarding house."

and on page 790 of same opinion, the Court says:

> "It is contended by the Government that the warrant could lawfully issue, if the facts supported by oath justified the magistrate issuing the warrant in concluding that there was probable cause to believe that the dwelling was in part used for the business of manufacturing liquor. To adopt this contention is to extend by implication the right to search dwellings beyond the express limitations of the act."

In the case of *United States v. Kelih,* also cited supra, on page 490, the Court says:

> "If Section 25, supra, had used the words 'unless it is being used for the unlawful sale or manufacture of intoxicating liquor,' a different situation would arise; but the statute does not use the italicized words, and limits the business purpose to such as a 'store, shop, saloon, restaurant, hotel, or boarding house.' And there is now and was then no evidence to support the

contention that the premises were used in part for any of the specific excepted purposes set out in the statute. The Court is of the opinion that the search warrant was void; that the search made under it was illegal and unlawful."

Judge Dooling, in the case of *United States v. Mitchell,* cited supra, on page 130 of the Report, holds:

"The National Prohibition Act further provides that no search warrant shall issue to search any private dwelling, occupied as such, unless it is being used for the unlawful sale of intoxicating liquor, or is in part used for some business purpose. It should not be difficult to keep within these provisions. If in the attempted enforcement of the Prohibition Law a search warrant is applied for, the first inquiry of the judge or commissioner should be as to the character of the place to be searched. If it be a private dwelling, then the inquiry should be: 'What evidence have you that this place is being used for the unlawful sale of intoxicating liquor?'

"If the officer has no such evidence, he should not apply for the warrant; or if the judge or commissioner is not satisfied with the evidence offered, he should not issue it. If the officer is acting upon information, he should lay all the facts before the judge or commissioner, with the names of the persons from whom his information is received."

THE CLAIM OF SMELLING MASH AND INTOXICATING LIQUOR BY FEDERAL OFFICERS IS NOT PROBABLE CAUSE FOR SEARCHING A PRIVATE DWELLING WITHOUT THE AUTHORIZATION OF A SEARCH WARRANT BASED UPON AN AFFIDAVIT SETTING FORTH A SALE FROM THE PREMISES TO BE SEARCHED. FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION; SECTION (25) NATIONAL PROHIBITION ACT.

In considering this phase of the case, the testimony of Federal Agent Shurtleff should be borne in mind, it is as follows:

> "I smelled the odor of distillation there sometime previous to March 9th, 1922. I was told there was liquor being manufactured on the premises; upon that information and upon the information of my senses; that is, my sense of smell, I went to the Commissioner and had a search warrant issued for the basement."

Upon the authority of "I was told there was liquor being manufactured on the premises" he trespassed upon the private property of plaintiff in error and searched his dwelling. He says that sometime previous to March 9th, 1922, at night, he smelled the odor of distillation there. Can it be possible that this statement will justify this search and seizure? The answer is obviously "no." Especially when you consider the cases cited heretofore and the language of the following case:

> 1 Fed. (2nd) 36,
>
> "Affidavit reciting that affiant on investigating defendant's dwelling detected strong odor of fermenting mash, held insufficient showing of probable cause that liquor was being unlawfully manufactured therein to warrant search warrant."

The so called "smell" and "I was told" search warrant cases have often been before the Circuit Courts and have invariably been held bad. Certainly the instant case is clearly another example of an unreasonable search and seizure and should be reversed.

In the case of *Veeder v. United States,* 252 Fed. 418, the Court says:

> "No search warrant shall be issued unless the judge has first been furnished with facts under oath—not suspicions, beliefs, or surmises—but facts which, when the law is properly applied to them, tend to establish probable cause for believing that the legal conclusion is right. The inviolability of the accused's home is to be determined by the facts, not by rumor, suspicion, or guess work. If the facts afford the legal basis for the search warrant the accused must take the consequences. But equally there must be consequences for the accused to face. If the sworn accusation is based on fiction, the accuser must take the chance of being punished for perjury. Hence the necessity of a sworn statement of facts, because one can not be convicted of perjury for having a belief, though the belief be utterly unfounded in fact and law."

In the case of *United States v. Falloco,* 277 Fed. 76, often cited by this Court in its opinions, the facts were:

> "That the defendant's premises consisted of a house, barn and shed, all of which were within the same inclosure, that is to say situated upon the same lot of ground in Kansas City, Mo. The officers passed from the shed through a sort of harness room and through a door which

led into an underground apartment; that part of the ground in which this latter apartment was situated being higher than that upon which the shed stood. They there found a still, some whiskey and some mash for use in making whiskey. The defendant was present and in charge. The still was in operation. They arrested the defendant and turned him and a sample of the whiskey over to the Federal officers and this prosecution resulted. The attention of the officers was directed to the property in question by smelling the odor of the distillation while walking their beat on the street along which the building was located. Their sense of smell led them to the hidden illicit apparatus and product. They had no search warrant."

In the case of *United States v. Ross*, cited in the same opinion, the facts recited are as follows:

"The officers had been directed by their superiors of the Police Department to proceed to the Ross premises, where there was reason to believe that the illicit manufacture of whiskey was in progress. As they approached the house the fumes of the distillation were distinctly perceptible. They demanded admission to the house, which was subsequently granted, and they gained access to one of the rooms in which a considerable quantity of liquor was found, and beneath the floor was found a still in operation and about 17 barrels of mash. Here again the officers had no search warrant."

There was co-operation in each of the two last mentioned cases between the Police Department and the officers of the Government. The Federal Officers had special knowledge or issued directions in each specific case. In each case the defendants made

application for suppression of the evidence and the applications were granted.

In the case of *United States v. Kelih,* 272 Fed. 490, the Court said:

> "The further contention is made that, because there were two Deputy Collectors of Internal Revenue in Group Chief Higgins' raiding party, when they reached the premises in question and observed the odors incident to the distillation process, therefore they had a right to seize and destroy the apparatus, and that by virtue of their powers the property in question might be used in the pending criminal case against the defendant. The Fourth Amendment and the 25th Section of the Volstead Act make no exceptions of Collectors of Internal Revenue; if this were a civil proceeding by the Government to collect a tax, a different situation might arise but one which is entitled to no consideration here."

In the case of *United States v. Jajeswich,* 285 Fed. 789, there was a search warrant, the Court says that,

> "The only facts upon which probable cause could be predicated were that an odor of liquor and mash emanated from the premises and a quantity of used mash was visibly present thereon."

The Court held this insufficient to justify the search, saying:

> "It is contended by the Government that the warrant could lawfully issue, if the facts supported by oaths justified the magistrate issuing the warrant in concluding that there was probable cause to believe that the dwelling was in

> part used for the business of manufacturing liquor. To adopt this contention is to extend by implication the right to search dwellings beyond the express limitations of the Act."

Logic and an unprejudiced interpretation of the Fourth and Fifth Amendments to the United States Constitution will sanction the reasoning in the four last mentioned decisions when it is borne in mind that the Supreme Court has declared that,

> "It has been repeatedly decided that these Amendments should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by them, by imperceptible practice of courts, or by well-intentioned but mistakenly over-zealous executive officers."
>
> *Gouled v. United States,* 225 U. S. 304.

There is not a decision to be found in the United States Reports which would justify the conduct of Federal Officers Shurtleff and his associates.

THE NEXT POINT IS WHETHER OR NOT A CRIME WAS BEING COMMITTED IN THE PRESENCE OF THE OFFICERS SO AS TO JUSTIFY THE SEARCH AND SEIZURE MADE IN THIS PARTICULAR CASE.

First—The defendant was not present or at home at the time of the search and seizure made, as stated by Federal Agent D. W. Rinkel, (Page 19, Trans. Rec.). "The defendant was not there at the time. He was subsequently arrested."

Second—The impossibility of the officers to know that any crime was being committed at the time the search and seizure was made. Federal Agent Shurtleff testified as follows:

> "This dugout, the reason for that was underneath the basement; it is a very low basement under the house it was may be four or five feet. We have to stoop over to walk under it and we entered from the side of the house. He had a trap door at the side of the house. We crawled under there. We shoveled away the dirt and found a trap door about two feet square, and going down through this trap door was a ladder, I guess about ten feet deep underneath this house. This dirt floor was this dugout that I described, and in this dugout was a complete distilling apparatus. (Trans. Rec. Pages 11 and 12.)

The facts in the case at bar are practically on all fours with a case recently considered by this Court —*Temperani v. United States,* No. 4129 Records of this Court, wherein it was said:

> "The government, as we understand it, does not claim the right to search a private dwelling or garage under the facts disclosed by this record, but an attempt is made to justify the conduct of the officers under the common law or statutory rule permitting peace officers to make arrests for offenses committed within their presence. But here the offender was not in the presence of the officers; he was not in the garage, and they had no reason to suspect that he was there."

Seizure on mere suspicion not justified by the confirmation of suspicion. *Karski v. U. S.,* 1 Fed. (2nd) 620.

MOTION TO EXCLUDE EVIDENCE AND TO QUASH SEARCH WARRANT WAS TIMELY MADE.

Defendant not present at the time of the search and seizure mentioned herein; had no knowledge that a search warrant was issued until the evidence was developed by the government during the trial of the case; defendant, at that time, made immediate objection and moved the Court that the search warrant be quashed and that all evidence and testimony secured by virtue thereof be excluded. Which motion the Court denied. (Trans. Rec. pages 17, 18 and 22.)

The following authorities maintain defendant's right to move to quash an illegal search warrant and exclude evidence obtained thereunder during the trial of the case if done immediately upon learning of the existence of said illegal search warrant and illegal seizure.

Amos v. U. S., 255 U. S. 315;
Gouled v. U. S., 255 U. S. 298;
Holmes v. U. S. 275 Fed. 49;
Ganci v. U. S., 289 Fed. 60.

CROSS-EXAMINATION OF DEFENDANT BY DEPUTY UNITED STATES ATTORNEY AND COURT BEYOND THE SCOPE OF THE EXAMINATION IN CHIEF OF SAID DEFENDANT.

This question arose subsequent to the direct examination of defendant. The defendant became a witness for himself and in his examination in chief testified regarding only two subjects, to-wit: describing his dwelling house and whether or not he had sold intoxicating liquor therein. (Trans. Rec. pages 22 and 23.)

The above two subjects were the only ones touched upon by defendant in his direct examination. The first question asked, however, by the deputy United States Attorney on cross-examination was:

"Mr. Souza, you owned this still that was found there?" and to which defended objected on the ground that it was not proper cross-examination and to which the Court remarked that the Supreme Court in the cases of *Diggs and Caminetti* held distinctly that when a defendant goes on the witness stand in his own behalf he opens up the whole subject, and overruled the objection, and to which ruling defendant duly excepted. (Trans. Rec. page 23.)

The questions asked defendant in his examination in chief did not in any manner pertain to the charges contained in the information which were: "Possession of property designed for the manufacture of intoxicating liquor; possession of intoxicating liquor and the manufacture of intoxicating liquor," and did not pertain to the guilt of the

defendant in any of the aforementioned charges. The defendant was not charged with sale of intoxicating liquor. The purpose of his examination in chief, as may be readily seen, was to ascertain the character and kind of a home and house in which he was living; to show that same was a private dwelling within the meaning of Section 25 of the National Prohibition Act; and further, to have the defendant testify that he had not sold intoxicating liquor in said private dwelling to come under and within the provisions of Section 25 of the National Prohibition Act, for the purpose of showing the illegality of the search and seizure in this particular case, and that was the only purpose of the direct examination of the defendant.

The Court, however, obviously misunderstood the purpose and purport of the testimony in chief of said defendant and allowed the Deputy United States Attorney to question the defendant at length, as will be seen from a reading of the transcript on pages 23-24 and 25.

In view of the fact that the lower court was clearly in error with reference to the rule adopted by this Court, as well as the United States Supreme Court, in the *Diggs, Caminetti* cases, counsel feels it is well to dwell for a moment upon that subject. The *Diggs, Caminetti* cases are reported in 220 Fed. at page 545 and in 242 United States 470, in 220 Fed. at page 551; this Court after citing numerous authorities, quotes: *Sawyer v. United States,* 202 U. S. 150, as follows:

> "It has been held in this Court that a prisoner who takes a stand in his own behalf waives his constitutional privilege of silence, and that the prosecutor has a right to cross-examine him under his EVIDENCE IN CHIEF with the same latitude as would be exercised in the case of an ordinary witness as to the circumstances connecting him with the same crime."

and further, the Court proceeds with the following language:

> "We take this to mean that the waiver of the constitutional privilege of a defendant in a criminal case is a complete waiver and places the defendant in the same attitude as that of a defendant in a *civil action* who testifies in his *own* behalf."
>
> "The plaintiff in error waived his privilege of silence when he took the witness stand and testified as to the SUBJECT-MATTER of the offense with which he was charged. He testified at length and in detail as to his relations with the two girls and his codefendant covering a considerable period of time, and ending abruptly at the railroad station at a late hour in the night on which the party took the train to Reno. There he stopped. He made no denial of the testimony that he purchased the train tickets and procured the drawing room on the pullman car, or that the drawing room was actually occupied by the members of the party in the manner in which the girls testified that it was. Nor did he deny his participation in the discussion of the plan of securing a cabin or bungalow at Reno in which the parties went to live during their stay at Reno."

The rule adopted in the *Diggs, Caminetti* cases, as may be seen, is that the cross-examination of a

defendant who takes the witness stand can only extend to the matters testified to by that defendant in chief, and does not determine that when a defendant takes the witness stand he opens up the entire subject as was stated by the trial Court in his ruling upon the question of improper cross-examination of the defendant. The *Diggs, Caminetti* cases hold that when a defendant takes the witness stand and testifies to certain matters relative to the charge under which he is being tried, and explains certain features of that charge, but fails to explain others which are in evidence, that it is proper for the Court to instruct the jury to take into consideration his silence, and the inference which is to be drawn from his failure to meet the evidence as to those matters within his own knowledge. The *Diggs, Caminetti* cases follow the general American rule that cross-examination can only relate to facts and circumstances connected with matters stated on the direct examination of the witness.

Houghton v. Jones, (1) Wall. 702;
Wills v. Russel, 100 U. S. 621;
Northwestern Railway Company v. Urlin, 158 U. S. 271.

From a reading of the authorities it seems that where a general subject is entered upon on direct examination, opposing counsel may cross-examine, or where part of a conversation or transaction is related, cross-examination is proper to elicit a full explanation but distinct and independent state-

ments and inquiries in no way connected with the statement given in direct examination, such as new matter and those which in no way tend to qualify or explain such statement, can not be called out on cross-examination.

THE FEDERAL COURT SHALL BE GOVERNED BY THE RULE ADOPTED IN THE STATE COURTS, IN THE JURISDICTION WHERE THE DEFENDANT IS ON TRIAL, AS TO THE NATURE AND EXTENT OF THE CROSS-EXAMINATION OF SUCH DEFENDANT.

> "It is not contended that the subject to which the cross-examination related was not pertinent to the issue to be tried; and whether a cross-examination must be confined to matters pertinent to the testimony-in-chief, or may be extended to the matters in issue, is certainly a question of state law as administered in the courts of the state, and not of Federal law."
>
> *Spies v. Illinois,* 123 U. S. Rep. 180.

Section 1323 of the Penal Code of the State of California, is as follows:

> "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief. His neglect or refusal to be a witness cannot in any manner prejudice him nor be used against him on the trial or proceeding."

See:

People v. Hamblin, 68 Cal. 101;

People v. O'Brien, 66 Cal. 602.

The rule on this subject in the United States Courts is that the party in whose behalf a witness is called, has a right to restrict his cross-examination to the subjects of his direct examination, and a violation of this right is reversible error. If an examiner would inquire of a witness concerning matters not opened on direct examination, he must call him in his own behalf."

Herd v. United States, 255 Fed. 829.

See:

Kettenbach v. UnitedStates 202 Fed. 377.

THE EXTENT AND NATURE OF THE QUESTIONS ASKED BY THE COURT WERE IMPROPER AND PREJUDICIAL TO THE INTERESTS OF THE DEFENDANT.

"A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge. Besides, the defendant's counsel is placed at a disadvantage, as they might hesitate to make objections and reserve exceptions to the judge's examination, because, if they make objections, unlike the effect of their objections to questions by opposing counsel, it will appear to the jury that there is direct conflict between them and the court."

Alder v. United States, 182 Fed. Rep. 472;

Dunn v. People, 172 Ill. 582.

NEXT TO BE CONSIDERED WAS THE RIGHT OF THE DEPUTY UNITED STATES ATTORNEY TO QUESTION DEFENDANT AS TO A FORMER ARREST BUT NOT CONVICTION. THE DEPUTY UNITED STATES ATTORNEY ASKED OF THE DEFENDANT THE FOLLOWING QUESTION:

"You were arrested in 1921 weren't you?"

To which an objection was regularly taken, the objection being overruled and an exception noted. (Trans. Rec. page 24.)

The general rule with reference to such cross-examination is stated in 25 A. L. R. page 340 as follows:

> "It is generally held that inquiries of an accused on cross-examination as to prior arrests are not competent for the purpose of affecting his credibility."
>
> "Although by way of impeachment, his conviction, of a prior crime, may be brought out on cross-examination, yet an admission in evidence of the facts of the offense on cross-examination is reversible error, and to compel him to answer as to past transactions, even though similar but which are separate and distinct so that through such admission the jury might be led to infer his guilt rather than to establish it from the evidence, is to violate the constitutional guaranty protecting him from giving evidence against himself."
>
> *Warton Criminal Evidence,* page 904.

> "Whatever may be the limit in this respect, nothing short of a conviction of a crime is admissible for the purpose of impeachment. A mere accusation or indictment will not be ad-

> mitted, for the reason that innocent men are often arrested charged with a criminal offense."
>
> *Glover v. United States,* 147 Fed. Rep. 429.

A former arrest does not tend to prove conviction of any offense, and until proof of conviction the defendant shall be protected by the legal presumption of innocence. The weight of authority seems to hold such evidence inadmissible. It is presumed that this Court will take judicial notice of the records of this District Court of the United States and the records of the District Court of the United States will show that case No. 110,110 was dismissed subsequent to the conviction of the defendant in this matter.

CONCLUSION.

It is respectfully submitted that for the reasons stated in this brief that the judgment of the lower Court should be reversed.

Dated, Oakland,
March 7, 1915.

GILMAN & HARNDEN,
Attorneys for Plaintiff in Error.

No. 4361

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN R. SOUZA,

Plaintiff in Error,

vs.

UNITED STATES OF AMERICA.

Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

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IN THE

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JOHN R. SOUZA,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT

This is a writ of error to the District Court of the Northern District of California to reverse the conviction of J. R. Souza, hereinafter called the defendant, for three several violations of the National Prohibition Act.

On April 20, 1922, an information in three counts was presented against the defendant. In the first count it was charged that on the 9th of March, 1922, at 2202 E. 17th Street, Oakland, California, he had in his possession certain property designed for the *manufacture* of liquor, and a 50-gallon still, 12 fifty-gallon barrels of mash and certain machinery was specified. Other appropriate allegations were made,

stating that the possession was in violation of Section 25 of Title 2 of the Act;

The second count charged that at the same time and place and under the same circumstances defendant *possessed* certain intoxicating liquor, to-wit: fifty gallons of Jackass Brandy, with other appropriate allegations;

The third count charged that at the same time and place the defendant *manufactured* certain intoxicating liquor, to-wit: Fifty gallons of Jackass Brandy, other appropriate allegations being added.

The defendant having been arraigned pleaded not guilty and was brought on for trial on the 9th of April, 1924, and convicted upon all four counts (Tr. p. 31). Thereupon he was sentenced upon the conviction to pay a fine of $500 on the first count, a fine of $500 on the second count and be imprisoned for one year in the San Francisco County Jail on the third count. (Tr. p. 32).

There is a bill of exceptions in the record of comparatively narrow compass. There was no motion for a directed verdict nor has the charge of the court been brought up. There was no antecedent motion to quash any such warrant or to exclude or suppress evidence. The exceptions urged were not to exceed nine in number and were taken wholly in respect to the admission of the testimony.

The assignments of error appear at page 42 of the Transcript and are exceedingly general and in-

definite in respect to the rulings complained of. At the trial three witnesses testified on behalf of the government and the defendant gave certain testimony on his own behalf.

Witness SHURTLEFF, a prohibition officer and four years in the service, visited the premises at 2202 E. 17th Street, Oakland, California, the premises owned by the defendant, and testified:

"The defendant lives on the premises. The still was found in a tunnel or dugout, as I would call it, underneath the house. I had visited the premises prior to this and had noticed the odor of distillation and fermenting mash around these premises. I am familiar with the odor of fermenting mash and the odor of distillation; a day or so before the search-warrant was secured for the place I visited the place one night, and I could smell odors of distillation and of mash.

On March 9th I was accompanied by Agent Rinckel, Agent McMahon and Agent De Spain. We found a distillation plant. I think it was 50 gallon barrels, and we also found an electric fan, or a fan and the motors to run it, and an electric pump. This dugout—the reason for that was underneath the basement it is a very low basement under the house, I should say about maybe four of five feet; you have to stoop over to walk under it, and we entered from the side of the house, he had a trap-door at the side of the house; we crawled under there; we shoveled away the dirt and found a trap-door about two feet quare and going down through this trap-door on a ladder, I guess about 10 feet

deep underneath this house, this dirt floor, was this dugout that I described, and in the dugout was a complete distilling apparatus."

Witness identified a distilling plant, also a sample of liquor and certain bottles and said further:

"We visited these premises on a prior case, to-wit, May 9, 1921. We found 10 or 12 50-gallon barrels of mash, 50-gallon stills set up and running, and stands and motors and found Mr. Souza in the dugout," and that on this case we found all this property in the same place.

On cross-examination witness said:

"These premises are located at 2202 East 17th Street, Oakland, California. At that time Mr. Souza resided there. I think I see his wife, see a lady there. I think it was his wife. I had a conversation with her. I think it is a home residence. It is not very far from the street, approximately five or ten feet on one side and maybe twenty on the end. Corner house. There is a lawn around it and a fence around the yard. I did not have to go into the house to get into this dugout. If I have my directions right the house faces the south and we entered through a little door on the east side of the house from the outside of the house. We got into the yard through the front gate and walked around to the side of the house. A little door on the side of the house led under the house; beneath the house proper, and we crawled in underneath; we came to this dugout; the dugout was directly beneath the house proper. At the time we search the premises March, 1922, I did not enter the residence there. Nor the other officers to my knowledge. It is not the fact that at the time I searched the premises I went

into the residence, went into the home, into the house proper, that I went through the house proper; I went through a trap-door near to the house into this dugout. I do not know as to the trap-door, neved called to my attention that there was a trap-door. I did not see a trap-door immediately above the entrance to the dugout which went into the residence proper. It isn't a fact that Commissioner Hardy went out there with me. Nor did he go with the other officers to my knowledge. I entered the premises by virtue of a search warrant issued by Commissioner Hardy of Oakland. The still was in the dugout, as I call it. The only thing I could not figure out was that he dug this dugout under this board floor underneath the house for a still room only; in fact, he told me himself that it cost him about $1500 to fix the dugout and his property that he had there cost him about $1500. It was not used for other purposes. I saw nothing else there besides the property we took. It was not used as a cellar or part of the residence. This dugout or cellar or basement is immediately below the house proper; underneath the house proper, and within the fence that encircled around the house. We were compelled in order to go into the premises to go through a gate, the front gate, and enter the premises; go to the side of the house; go through a small door; crawl on our hands and knees for some distance and then dig away some dirt and then enter this dugout; I say we entered there pursuant to that search-warrant. I or any other person to my knowledge did not purchase or buy any liquor from the defendant there; not that I know of. There was not a sale of intoxicating liquor upon the premises to my individual knowledge. I smelled the odor of distillation there some time previous to the raid,

previous to March 9, 1922. I was told that there was liquor being manufactured on the premises. Upon that information and upon the information of my senses; that is my sense of smell, I went to the Commissioner and had a search-warrant issued for the basement, for this dugout. This hole down there was eight by ten by twelve, something like that."

Witness RINCKEL testified substantially as follows:

"I am a prohibition officer; have been for the last four years. Accompanied Agent Shurleff on the 9th day of March, we entered the front gate at 2202 E. 17th Street, Oakland; walked around to the east side and crawled under the house and a small door was there, about a two by four door, and went up to the front of the house. We were unable at that time to observe any indications of where this pit was, although we could smell the fermentation of mash. We searched there for probably ten or fifteen minutes, until we found alongside of a post, cleverly concealed, two electric wires running down into the ground. We dug down alongside of those wires until we came to the top, which was some boards, and we cleaned off those boards, and finally found a trap-door. We went through the trap-door and down into a room and there we found mash, and about 50 gallons of jackass brandy. I have seen these bottles that have been introduced for the purpose of identification by the prosecution. Those were samples of that jackass brandy taken in my presence. The defendant was not there at that time. He was subsequently arrested. The premises as far as I know were occupied as a private dwelling. There was a woman, his wife, came down and asked us what our business was there. We

showed our search-warrant and pursuant to that search-warrant we searched the premises. Witness never purchased any liquor on the premises and does not know of any liquor being sold there of his own knowledge. I went there with the other agents and did not go into the house proper.

These premises are occupied as a private residence by the defendant. Had never purchased any liquor on the premises."

It was stipulated that certain liquor which the government used as an exhibit contained 25 per cent of alcohol by volume. The defendant testified in chief as follows:

"I reside at 2202 East Seventeenth Street, with my family. We have nine in the family. There were two other families lived downstairs in two apartments. My home is a two-story house, with a basement underneath. There is an entrance to the basement on the side of the house and also through a little trap-door in one of the rooms on the second floor. The basement may be entered from either way. A fence surrounds the house and the basement is directly under the house, and within the space enclosed by the walls of the house. I have not sold any intoxicating liquors on the premises."

On cross-examination of defendant the following occurred:

Mr. McDonald—Mr. Souza, you owned this still that was found there?

Mr. Gilman—To which I object. It is not proper cross-examination.

The Court—Why?

MR. GILMAN—I put him on the witness-stand for two things: First, to prove the residence; second, that he did not sell liquor there. Those are the two questions I asked him.

THE COURT—The Supreme Court, in a case from this district, the case of Diggs and Caminetti, held distinctly that when a defendant goes on the stand in his own behalf he opens up the whole subject. Overruled.

MR. GILMAN—Exception noted.

MR. MCDONALD—You owned this still, didn't you, Mr. Souza?

WITNESS—What is that?

MR. MCDONALD—That still that was there, that was your still, wasn't it?

WITNESS—It wasn't a still. It was part of a still.

MR. MCDONALD.—And this jackass brandy, was yours, wasn't it?

WITNESS—Yes.

MR. MCDONALD—You were arrested in 1921, weren't you?

MR. GILMAN—Just a minute. To which I object as being incompetent, irrevelant and immaterial, and not proper cross-examination.

THE COURT—Overruled.

MR. GILMAN—Exception noted.

MR. MCDONALD—Q. You were arrested in 1921 by Mr. Shurtleff, this man here? A. No.

Q. You say you were not arrested?

A. No, only in 1921.

Q. In 1921, on the 9th day of May, 1921?

A. Yes, I was.

Q. You were?

A. Yes; I do not know the day but I was arrested one time before.

Q. Yes, you were caught that time actually running a still, weren't you?

A. Yes.

THE COURT—Did you (Souza) make this jackass brandy?

WITNESS—No, sir, that was given to me to finish up. That was not finished, that is, not ready to drink.

THE COURT—Did you have mash there?

WITNESS—Yes, I had mash there.

THE COURT—And there was actually mash there present, was there?

WITNESS—There was not mash there for that purpose. I was trying to run that mash to get rid of it and run that little to make a little liquor for my own use.

MR. GILMAN—May it be understood that I may have an exception to the questions asked by the Court?

THE COURT—You may have an objection and an exception.

Laying aside consideration of the assignment of errors, the contentions of defendant's brief are substantially two in number:

(a) That the court erred in receiving testimony as to search and seizure of certain property;

(b) That the Court erred in permitting questions to be asked of defendant on cross-examination.

No questions are made as to the sufficiency of the information, nor as to the sufficiency of the evidence to uphold the verdict, nor has any objection or exception been taken to any charge of the Court given or refused.

ARGUMENT

I

The court did not err in admitting in evidence any property taken on an unlawful search.

The greater part of the defendant's brief is devoted to an attempt to show that his rights were violated prejudicially by the court's action in permitting the use in evidence of certain liquors and a certain still seized by officers upon a search, and in receiving testimony of the officers as to the search.

But in this case there is not wanting a search warrant. The officers testified that they had such warrant and acted upon it. Moreover, neither the search warrant, nor the affidavit affording its basis, nor the return showing its execution were put in evidence. And, of course, no such papers have been brought up in the record here.

Accordingly, there is a double presumption as to the integrity of the proceedings.

a) There is the presumption against error, for on appeal the presumptions are with the government as to all proceedings not shown of record.

b) There is also the presumption that official duty has been regularly performed; such presumptions are to be given effect here, unless otherwise negatived.

There has been no question raised, nor can any question be raised, as to the regularity of the form of the several documents, nor as to the regularity of the execution and return of the warrant.

Accordingly, the plaintiff in error here is confined in his attack upon the warrant to such features only as to which testimony may have been directed. And as to even these features where the evidence may be seen to be conflicting the ruling of the trial court is beyond review.

There is rarely brought here such a meager record with a design to test to correctness of a court's ruling in receiving in evidence liquors obtained upon a search warrant.

Referring to the incidental references to the matter in the testimony, it will be seen that the officers testified that they did have a search warrant for the search in question. (Tr. p. 11.) It was further shown by the testimony of witness Shurtleff that he visited the premises prior to this and had noticed the odor of *distillation* and *fermenting mash* around these premises; that witness was "familiar with the odor of fermenting mash and the odor of distillation". A day or so before the search warrant was secured for the place witness visited the place one night and could smell odors of distillation and of

mash (Tr. p. 11) and further on cross-examination the same witness said, "I entered the premises by virtue of a search warrant issued by Commissioner Hardie of Oakland". (Tr. p. 15.) And further, "I say we entered there pursuant to that search warrant." He conceded that, "I or any other person to my knowledge did not purchase or buy any liquor from the defendant there not that I know of. There was not a sale of intoxicating liquor on the premises to my individual knowledge." He said further, "I smelled the odor of distillation there some time previous to the raid previous to March 9, 1923." "I was told that there was liquor being manufactured on the premises." Upon that information and *upon the information of my senses; that is my sense of smell.* I went to the Commissioner and had a search warrant issued for the basement, *for this dugout.* And again, (question by Mr. Gilman), "You were told so and upon that information and upon the information of your senses; that is your sense of smell, you went to the Commissioner and had a search warrant issue. Is that correct?" "A. Yes, sir, *for the basement, for this dugout, yes.*"

Neither the search warrant nor the affidavit were before the court. (Tr. pp. 16, 17.)

Witness Rinckel said, (Tr. p. 19) "We showed a search warrant and pursuant to that search warrant we searched the premises. We never purchased any liquor on the premises and do not know of any liquor being sold there of my own knowledge. Went

there with the other agents and *didn't go into the house proper.*"

The only thing made at all definite by the proof was that there *was* such a search warrant and that, while it may have indicated that the officer was informed of certain things, there was, nevertheless, stated the definite fact that the officer personally examined the premises and came to *know by his sense of smell* of the *fact* of there being fermenting mash there, as well as distillation going on. He stated in his examination that he was familiar with the odors; and it must be presumed that in his affidavit the matter was stated in the strongest possible form necessary to make a proper showing, the affidavit in question not being brought up. We know merely the subject which the affidavit discussed,—that the officer knew the facts pointing to probable cause from his sense of smell, but the court cannot now say that the matter was not stated in such strong, positive form as would have shown probable cause to the Commissioner.

The fact that odors emanate from such contraband manufacture of liquors is well known. We may refer to the statement of Judge Gilbert in his opinion in the case of *Carney vs. United States,* 295 Fed. 610, wherein it was said that,

> "It is a matter of common knowledge that the odor of fermenting mash is penetrating, persistent and pervasive."

In the case of *McBride vs. U. S.,* 248 Fed. 416,

419, the Circuit Court of Appeals of the Fifth Circuit said:

> "At common law it was always lawful to arrest a person without warrant, where a crime was being committed in the presence of an officer and to enter a building without warrant, in which such crime was being perpetrated. *Wharton, Criminal Procedure* (10th Ed.), Secs. 34, 51; *Delafoile v. New Jersey,* 54 N. J. Law, 381, 24 Atl. 557, 16 L. R. A. 500, 502; *In re Acker* C. C.), 66 Fed. 290, 293.
>
> Where an officer is being apprised by any of his senses that a crime is being committed, it is being committed in his presence, so as to justify an arrest without warrant. *Piedmont Hotel v. Henderson,* 9 Ga. App. 672, 681, 72 S. E. 51; *Earl v. State,* 124 Ga. 28, 29, 52, S. E. 78; *Brooks v. State,* 114, Ga. 6, 8, 39, S. E. 877; *Ramsey v. State,* 92 Ga. 53, 63, 17, S. E. 613. Therefore we are of the opinion that the entry into this stable under the circumstances of this case was legal, and that the court did not err in admitting the testimony of the officers."

The evidence of the commission of crime in the McBride case was derived principally or wholly through the sense of smell.

The case of *United States vs. Borkowski,* 268 Fed. 408, 412, was a case of the same character wherein the officers through the sense of smell came to know that a crime was being committed. The District Court in that case said:

> "The rule, state and federal, is that officers may arrest those who break the peace or com-

mit crimes in their presence. *Bishop's New Crim. Proc.,* Sec. 183; *Byrne, Fed. Crim. Proc.,* Sec. 10; *Wolf v. State,* 19 Ohio St. 248. Byrne states that officers may avert a criminal act in the process of commission before them, either by arresting the doer or seizing and restraining the instrument of the crime. See also *Ross v. Leggett,* 61 Mich. 445, 28 N. W. 695, 1 Am. St. Rep. 608; *Ex parte Morrill* (C. C.), 35 Fed. 261; *Bad Elk v. U. S.,* 177 U. S. 530, 20 Sup. Ct. 729, 44 L. Ed. 874, and *Kurtz v. Moffit,* 115 U. S. 487, 6 Sup. Ct. 148, 29 L. Ed. 458. If an officer may arrest when he actually sees the commission of a misdemeanor or a felony, why may he not do the same, if the sense of smell informs him that a crime is being committed? Sight is but one of the senses, and an officer may be so trained that the sense of smell is as unerring as the sense of sight. These officers have said that there is that in the odor of boiling raisins which through their experience told them that a crime in violation of the revenue law was in progress. That they were so skilled that they could thus detect through the sense of smell is not controverted. I see no reason why the power to arrest may not exist, if the act of commission appeals to the sense of smell as well as to that of sight."

While the point under consideration in the two cases just cited was the right of an officer to arrest for a crime being committed in his presence, yet there can be no doubt that the same rule would apply here where the question is as to the statement for probable cause for warrant. In fact, if

there is any difference, the requirements of the former case should be more rigid. The case last cited was a District Court case of course. The cases cited by defendant upon the proposition discussed are also District Court cases. We may say generally as to these that they have not superior rank to that of the Court *a quo,* and that their rulings may not be considered authoritative or of value further than for the reasons given. Indeed, that is merely the statement of a well known principle of appellate practice.

More than that, it may well be observed that when this aspect of a case comes before a trial tribunal, in sustaining a search or a warrant or probable cause, it decides questions of fact, as well as law, and in holding in a particular case that a sufficient showing was not made, it is merely a ruling as to the judge's view of particular facts, so that if the ruling had been either way it would have been sustained by a reviewing tribunal. Such considerations have been heretofore appealed to this court. Thus in its opinion in *Winkler vs. U. S.,* 297 Fed. 202, 203, cited with approval certain language from the case of *Snyder vs. U. S.,* 285 Fed. 1, to wit:

> "Whether the offense was committed in the presence of the officer in this sense is primarily a question for the trial judge and his finding should not be disturbed on appeal unless it is without support in the evidence."

In the instant case the court below sustained the

view that the commissioner, under the law and the facts, had probable cause for issuing the search warrant in question.

It is not correct to say that the showing for the search warrant in the instant case was upon information and belief. While the officers may have been informed by others of certain facts, there was the definite fact apprehensible from one of the senses shown and thus the case was brought within the situation discussed in the case of *Forni vs. U. S.*, No. 4355, 3d Fed. 2d, wherein the affidavit did state the information and belief of the officers but further added the definite fact that he had gone to the premises as here and had seen certain liquors. In the instant case the surroundings were such as that the officer have known that the manufacture was contraband.

There was a showing of probable cause.

Some further contention is made that the premises here in question were a dwelling house and that there was no sale of liquor shown. In the first place it does not appear that in the initial showing before the Commissioner there was disclosed the fact that the premises were a dwelling. In fact, the inference is the contrary. For it was said by witness Shurtleff (Tr. p. 17) that the search warrant was issued for the basement—for this dugout—. Accordingly there was no requirement that the affidavit should show that the case was within one of the exceptions set forth in Section 25 of Title II of the National

Prohibition Act. There is nothing in the Search Warrant Act contained in Title XI of the Espionage Act which requires a showing upon that point. We think it entirely clear that the proceedings are sustainable unless controverted under the provisions of Section 15 of the Search Warrant Act.

It is submitted further that such an issue should be made in advance of the trial, and that in considering the matter now the court should consider it with that in mind.

Looking more particularly to the facts here disclosed, it is seen that there was a large still in a sort of a concealed dugout or subbasement on the defendant's premises and an unusual number of 50 gallon barrels of mash, together with a large amount of the manufactured product. The dugout *was not devoted to any other purpose whatever.* It even had machinery set up, such as electric motors, pump and fans, apparently for the purpose of dissipating the odors, the power being carried in by concealed wires.

It must therefore be clear,

a) That the dugout was not part of the dwelling,

b) That if considered to be a part it falls in the category of a shop as shown by Judge Gilbert in his dissenting opinion in the case of *Temperani vs. U. S., supra,* and

c) That whether a shop or not it was manifestly a use for a business commercial purpose

and thus within the exception in Section 25 of Title II of the National Prohibition Act.

(A) The dugout was not a part of the dwelling.

There was absolutely no other use being made of the dugout, except as a factory or distillery where the defendant had his still and machinery, together with necessary materials. The case thus differs from the Temperani case. While it may have been possible to enter the place from the dwelling proper, yet it was wholly apart from it and the officers entered from the side. They testify that the search warrant was for the dugout. (Tr. p. 16.) It was thus not for the dwelling. And witness Rinckel said, (Tr. p. 19) "I went there with the other agents and *did not go into the house proper.*" The case accordingly would not be different from the case of one who used a portion of the building in which he resided as a place of business. While in the same building, possibly in the same "curtilage," it would not be a part of the dwelling in any proper sense. It would not be the case of including such as a smoke house or other outbuildings of a farmer as a portion of his dwelling or homestead within his curtilage.

(B) Moreover, the dugout was, in any proper sense of the word, being used as a "shop."

The place was devoted to manufacturing distilled liquors from materials brought there. It had cost $1500.00 to install the plant (Tr. p. —). In addition to the machinery of the still, there was also an elec-

tric motor, a pump and fans, the latter being operated apparently by an electric current being carried down by concealed wires and to this thus must be conjoined the circumstance that no activity of home life was there being carried out; the place was used for no other purpose. Thus the observation of Judge Gilbert in the Temperani case is very pertinent. He there said:

> "It would be a permissible construction to hold that the defendant's garage, devoted, as it was, to manufacturing purposes, was a shop within the meaning of the statute. The Century Dictionary gives as one definition of a shop:
>
> > 'A room or building in which the making, preparing, or repairing of any article is carried on, or in which any industry is pursued.'
>
> A definition in 25 Amer. & Eng. Enc. of Law, 1058, is:
>
> > 'A building in which mechanics labor and sometimes keep their manufactures for sale.'
>
> In *Chicago, R. I. & P. Ry. Co. v. Denver & R. G. R. Co.,* (C. C.) 45 Fed. 304, 314, Judge Caldwell said:
>
> > 'Commonly, the word 'shop' means a building inside of which a mechanic carries on his work.'
>
> In *State v. Hanlon,* 32 Or. 95, 48 Pac. 353, it was held that a room wherein a workman pursued his business and kept his tools or the products of his labor was a shop, and in *McNab v. McGrath,* 5 U. S. Q. B. O. S. 516, a shop was

held to be a room where manufactures of some kind are carried on."

(C) In any event, considering the use to which the dugout was being put, whether it be called literally a shop or not, it was being used for a business purpose of the same character as if used for a store, shop, saloon or restaurant. That is to say the words "such as" as they appear in stating the exceptions in Section 25 of Title 2 of the National Prohibition Act, they are followed by the words for illustration rather than limitation or restriction. The matter is thus put by Judge Gilbert in the same opinion as follows:

> "But, irrespective of the question whether the room so occupied here as a distillery was a shop, there can be no doubt that the purpose to which the plaintiff in error devoted it partook of the nature of the classes of business specified as creating exceptions to the statute. It seems reasonably clear from the language of the statute that Congress intended to except from the protection against search all dwelling houses, a considerable portion of which are devoted to business purposes. The business purposes in contemplation were illustrated by referring to shops, saloons, etc.; but obviously it was not the intention to limit the exception to the precise kinds of business so enumerated. Otherwise there would have been no occasion to insert the words 'such as'. In other words, it is inferable that Congress intended to illustrate its purpose by reference to certain specified kinds of business, but did not intend to limit the ex-

ception to those which were enumerated, or to exclude others not dissimilar thereto.

"A private dwelling, used partly for dwelling house purposes and partly for carrying on any well-known business, should be held to be within the exception, as, for instance, a dwelling house used partly for a factory, a public garage, a filling station, a brewery, a distillery, or a storage warehouse. It may be conceded, as was held in *United States v. Kelih* (D. C.) 272 Fed. 484, that a dwelling house does not lose its character as such, and become a distillery, merely because a home-made still is found in operation therein; but in the present case the upper story was used as a dwelling house, and the basement, unconnected therewith, was used as a distillery, and the plaintiff in error was engaged in manufacturing intoxicating liquors upon a large scale, and indisputably for commercial purposes. It would, indeed, be a strained construction of the statute which would mean that a distiller or a brewer may so construct his dwelling as to combine with it a brewery or a distillery, and thereby obtain immunity from search or seizure"

It is pertinent to quote the following definition from the Louisiana Civil Code:

"The words 'such as' are employed to give some example of the rule and are never exclusive of other cases which that rule is made to embrace." C. C. Louisiana, Art. 3556, Sub. 29.

While it may be observed that this was a statute it was no doubt designed to state an existing current

definition rather than to accomplish a statutory alteration of the meaning of the words.

And in Webster's International Dictionary in re "such", it is stated:

> "Such often followed by 'that' or 'as' introduces the words or propositions which define the similarity or standard of comparison."

And in the case of *Harris vs. Nashville C. & St. L. Railroad Co.,* 44 Southern 962, 963, 153 Ala. 139, there was a point discussed turning on the meaning of the word "such as" when used in a statute and it was decided that what followed was *suggestive* rather than *mandatory.*

It is submitted that under lexicological definitions the word "such" imports similarity; that is to say, in the instant case it would be held to be equivalent to a statement that there was to be excepted places of business similar to stores, shops, restaurants, etc.

Accordingly it is submitted that a proper construction of the language constituting the exception in Section 25 of Title II of the National Prohibition Act would include in the exception such a place of business as here where it was apparently on a commercial basis and absolutely nothing pertaining to the home was there carried on. It is just as much within the purpose and intent of the law as would be any other business or store.

The dugout was thus searchable.

II

The defendant did not raise any question upon the search warrant seasonably; the court was not required to turn aside during the trial of the case to determine the collateral issue.

It is well settled that when evidence is offered in a criminal case which is said to be incompetent from some collateral reason depending on outside proof that the court cannot be expected to turn aside from the business at hand and determine the collateral issue. The result is that as a rule motions to suppress evidence and quash a search are made by a motion in advance wherein proper notice can be given and proper proofs taken. This was expressly declared by the Supreme Court of the United States in the case of *Adams vs. New York,* 192 U. S. 585, 48 L. Ed. 575, 579.

While it is true that in the later case of *Gouled vs. U. S.,* 255 U. S. 598, and perhaps in the case of *Amos vs. U. S.,* 255, U. S. 315, the court, speaking through Mr. Justice Day, declared that this was not a hard and fast rule, but, nevertheless, the rule was recognized and not set aside. It was said to be a very proper rule of procedure.

Accordingly, in the Gouled case when it appeared that the defendant did not know of the seizure of the incriminating document by stealth until it was produced to him when testifying on the stand and when it further appeared that the facts constituting the search were not in dispute, the court properly

said that Gouled would be entitled to raise the matter without a preliminary motion.

In the Amos case it appeared that the facts of a very flagrantly illegal search were admitted so that the court had nothing to do but apply questions of law.

But the instant case is one for the proper application of the rule of the Adams case if there ever was one.

It is not true that the record shows that the defendant had no knowledge of the search until the time of the trial. He had an opportunity to so state on the stand and he did not do so. The officers testified that they served the search warrant. What they did there would have been manifest to any householder. The presumption of regularity attaches to the return which would indicate the leaving of a copy and proper service. Since there is no showing but that the defendant knew all about the search from the beginning, he should have been held to move seasonably to quash the evidence, yet, while the search was on March 9, 1922, no question had been made concerning it until the trial had on the 9th of April, 1924. Thus there is the situation of the officers of the law regularly serving and executing of search warrant and making a return. No question is made as to the validity for two years, when suddenly during the trial of the action question is made as to whether the defendant was not

entitled to have the search warrant quashed by virtue of outside testimony as to which the government could not have been deemed to have been prepared.

Under the Adams case supra, and other cases in the same line, the court properly refused to quash the search warrant when attacked at so late a day.

III

The court did not err in respect of the cross-examination of defendant; the questions asked were clearly within the scope of his examination in chief.

The case of the government being in so that it could be seen just what the government's contention was, the defendant took the stand and testified to certain facts. (Tr. p. 22.)

He said he resided at 2202 E. 17th Street, which were the premises previously referred to. He said further, "There are two families living downstairs in two apartments." He referred to the basement underneath. Said it could be entered on the side of the house or through a little trap door through one of the rooms on the second floor. He further said, "I have not sold any intoxicating liquor on the premises."

Upon such a basis he was asked if he owned the still that was found there. It was to this question that the objection was interposed that it was not cross-examination. That it was within the issues of the case is undoubted. That it was within the scope

of the general examination is esaily seen. The government had proven that the still was found in the dugout underneath the house, Souza not being present. If Souza could convince the jury that two other families lived *downstairs* in two apartments there might be some warrant for urging upon the jury that the still did not belong to defendant. Manifestly it was a direct denial of that possible inference, to compel Souza to admit that it was he and not one of the other families who owned the still.

Moreover, he undertook to show the connection between the dugout and other portions of the house, seeking perhaps to have the jury draw the inference that it all constituted a portion of the house. It was in negation of such inference to prove that in the dugout there was this large still, a large amount of mash and manufactured brandy in amounts sufficient to indicate that a commercial purpose was intended by the possessor. In the examination in chief defendant also said, "I have not sold any intoxicating liquor in the premises." Clearly it would have been in negation of that testimony to some extent to show that there was such a quantity of liquor stored there, together with a still and the necessary mash to indicate that if defendant owned the property it was exceedingly likely that he had it for commercial purposes and thus not only intended to sell but actually had sold.

The situation bears a close analogy to that under review in the case of *Temperani vs. United States,* 299 Fed. 365. There, as will be seen from the tran-

script, (No. 4129) Temperani took the stand for almost the same general purpose. He stated his residence, described his family and described the various connections between the garage there in question and the remainder of the house. He did not state that there were any other families with him, nor did he deny that he had sold liquor. In the Temperani case the defendant was required on cross-examination to admit the ownership of a still found in the basement, although not mentioned in the examination in chief. Yet in response to a similar contention in that case, this court said in the majority opinion,

> "There is some claim that this admission was brought out through improper cross-examination, but the plaintiff in error took the witness stand for the purpose of proving what he kept in the garage, and the connection between the garage and other portions of the house, and the cross-examination was not entirely without the scope of the testimony thus given on direct." p. 367.

and thereupon the conviction upon one of the counts of the information was sustained upon the admissions of the defendant thus given on cross-examination.

Indeed, as was well said by the Supreme Court of the United States in the case of *Gilmer vs. Higley,* 110 U. S. 47, 28 L. Ed. 62:

> "To permit a party to the suit to tell his own tale of a transaction like this and to conceal

> what is important to the defendant in regard to the same occurrence and at the same time would be a gross perversion of justice and would bring into discredit the policy of permitting parties to actions to testify in their own behalf."

The same question was under review by this court in the case of *Diggs vs. United States,* 220 Fed. 545, 553. There the defendant testified as to various matters prior to what was termed the "trip to Reno." He was required to describe that trip on cross-examination.

Another case where this court held that the cross-examination did not exceed the scope of the main examination was *Kettenback vs. United States,* 202 Fed. 377, 385.

The same considerations herein adverted to apply to the questions asked defendant on cross-examination as to his arrest a few months previously. For it will be noted that as a part of the government's case and relevant upon the question of his intent necessary to be shown under Count One of the information, there was a previous offense shown of the same character and at the same place. (Tr. p. 13.) For it appeared that Witness Shurtleff visited the same premises May 9, 1921, and found there 10 or 12 fifty gallon barrels of mash, 50 gallon still set up and running and with plant and motors, and found Souza in the dugout.

Now if this testimony was true it would in a measure contradict the two statements made by

defendant in his examination in chief. It would tend to show that he and not the two families referred to owned the still. For he was then compelled to admit that he had possession of it at a former occasion. It would also be some evidence negative to his contention that he had actually sold no intoxicating liquor on the premises. For if he was actually in the operation of a large still of that character the court could have inferred that he was not carrying on such a commercial enterprise in manufacturing liquor for his own use; that he must have sold the liquors. In a measure it contradicts the matters referred to in the examination in chief.

It is to be borne in mind that, since the information did not charge a sale of liquors, whether the defendant actually sold liquors was not directly an issue. It only became material upon the collateral issue raised by the defendant to the effect that the warrant was improperly issued since he sold no liquor in the premises. It is submitted that upon this issue the burden was on the defendant. The warrant could have regularly issued without that feature being referred to in the showing of probable cause. It was thus incumbent upon the defendant to assume the burden of showing the non-sale in determining the collateral issue raised which was in effect an attack upon the search warrant under Section 15 of the Search Warrant Act.

Referring more particularly to the question as to the arrest of the defendant, it is submitted that such

was merely a preliminary matter of leading to the real point proven. That is to say, that on the occasions when he was arrested he was actually caught running the still. The matter was not without the main issue, since it was involved under the question of intent.

Upon a collateral issue, as to which the defendant had the burden of showing the facts, that is to say: the issue whether he had sold liquor on the premises and thus made a case for a search warrant, the defendant, having the burden, testified that he had *not sold* such *intoxicating liquor* on the premises. It thus became relevant to show on cross-examination that he had the still and one of the character described in the evidence, and not only that, but that he had a still at the same place on the 9th day of May, 1921. If either fact was true, it would be unlikely that he had not sold intoxicating liquor. And while he was asked about an arrest in introducing this latter incident, that was merely a part of the inducement leading up to the actual question, that is to say: as to whether or not he was caught running a still there at that time. It is not a case of proving a mere arrest as an isolated incident leaving the matter in doubt. Thus the mere incidental reference to his arrest on the occasion when he was caught violating the law in running the still could not have prejudiced.

Nor did the court err in asking the questions referred to on page 25 of the Transcript. These ques-

tions were of the same character as the others just adverted to, and that a District Court may in the aid of a proper elucidation of the facts ask questions is well settled, as this court well said in the case of *Kettenback vs. United States,* 202 Fed. 385, supra:

> "The trial judge in a federal court is not a mere presiding officer. It is his function to conduct the trial in an orderly way with a view to eliciting the truth, and to attaining justice between the parties. It is his duty to see that the issues are not obscured, that the trial is conducted in a proper manner, and that the testimony is not misunderstood by the jury, to check counsel in any effort to obtain an undue advantage or to distort the evidence, and to curtail an unnecessarily long and tedious or iterative examination or cross-examination of witnesses. He has the authority to interrogate witnesses, and to express his opinion upon the weight of the evidence and the credibility of the witnesses. In the case at bar there was no such expression of opinion by the court, and there is nothing in the record which is before us to indicate or to give the jury the impression that the judge was in any degree partial or biased or prejudiced against the plaintiffs in error."

As to modification of sentence.

While no point or question has been raised in defendant's brief as to excessive sentence, we note from the record that the third count was for the manufacture of liquors and it appears to us that under Section 29 of Title II of the National Prohi-

bition Act the punishment for that is limited to six months; the sentence here was for one year imprisonment.

Unless we are misapprehending some point in the record, we would understand that the judgment here should be modified so as to eliminate the excess. If the conviction is otherwise proper, and if we have shown that it was, there would be no necessity for altering anything but the judgment, and, under the authority of the decisions of this court, we urge that any modification should be made here by striking out the excess. Thus in the case of *Millich vs. U. S.*, 282 Fed. 604, 606, this court quoted with approval the following statement from 12 Cyc. 938:

> The appellate court, in affirming a conviction, may modify the punishment imposed by the trial court, by mitigating, reducing, or otherwise changing it, so far as it exceeds the limits prescribed by the statute. This rule applies to a fine or a sentence to a term of imprisonment in excess of that permitted by a statute, to a fine rendered against defendants jointly, to a sentence on a general verdict of guilty where one of several counts is unsustained by any evidence, and to a premature sentence."

And in the case of *Jackson vs. U. S.*, 102 Fed. 473, it was ordered that the judgment be modified by striking out the words "at hard labor" and thus modified and affirmed.

Wherefore we submit that the sentence may be modified by this court.

In conclusion it is submitted that the validity of the search involved in the case at bar was not properly raised by the defendant; that if deemed raised properly, the search was entirely valid, especially in face of any such objection as is here made; that the cross-examination was not improper; that the trial was free from error, the defendant was justly convicted and should serve his sentence.

Respectfully submitted,

STERLING CARR,
United States Attorney,

T. J. SHERIDAN,
Assistant United States Attorney,
Attorneys for Defendant in Error.

No. 4362

United States

Circuit Court of Appeals

For the Ninth Circuit.

JOHN EARL and JOHN JOHNSON,
Plaintiffs in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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United States District Court, Western District of Washington, Northern Division.
November, 1923, Term.

No. 8240.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL and JOHN JOHNSON,
Defendants.

INFORMATION.

BE IT REMEMBERED, that Thos. P. Revelle, Attorney of the United States of America for the Western District of Washington, who for the said United States in this behalf prosecutes in his own

*Page-number appearing at foot of page of original certified Transcript of Record.

person, comes here into the District Court of the said United States for the District aforesaid on this 24 day of January, in this same term, and for the said United States gives the Court here to understand and be informed that as appears from the affidavit of Gordon B. O'Harra, made under oath, herein filed: [2]

COUNT I.

That on the twenty-eighth day of December, in the year of our Lord one thousand nine hundred and twenty-three, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this Court, JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON

then and there being, did then and there knowingly, willfully, and unlawfully have and possess certain intoxicating liquor, to wit, one hundred ninety-two (192) one-fifth gallons of a certain liquor known as whiskey, twelve (12) one-fifth gallons of a certain liquor known as gin, and three (3) pints of a certain liquor known as beer, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, intended then and there by the said

JOHN EARL and JOHN JOHNSON,

for use in violating the Act of Congress passed October 28, 1919, known as the National Prohibition

Act, by selling, bartering, exchanging, giving away, and furnishing the said intoxicating liquor, which said possession of the said intoxicating liquor by the said

JOHN EARL AND JOHN ANDERSON,

as aforesaid, was then and there unlawful and prohibited by the Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided and against the peace and dignity of the United States of America. [3]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT II.

That prior to the commission by the said

JOHN EARL, *alias* JACK EARL,

of the said offense of possessing intoxicating liquor herein set forth and described in manner and form as aforesaid, said

JOHN EARL, *alias* JACK EARL,

on the 22d day of May, 1922, in cause No. 6810 at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the offense of possessing intoxicating liquor on the 13th day of May, 1922, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT III.

That on the twenty-eighth day of December, in the year of our Lord one thousand nine hundred and twenty-three, at the city of Seattle, in the Northern Division of the Western District of Washington, and within the jurisdiction of this court, JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

then and there being, did then and there knowingly, willfully, and unlawfully transport in a certain vehicle then and there in charge of the said

JOHN EARL and JOHN JOHNSON,

to wit, an automobile known as a Dodge Touring Automobile, License No. 111,553, Engine No. 886–009, certain intoxicating liquor, to wit, one hundred ninety-two (192) one-fifth gallons of a certain liquor known as whiskey, twelve (12) one-fifth gallons of a certain liquor known as gin, and three (3) pints of a certain liquor known as beer, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said United States Attorney unknown, and which transporting by the said

JOHN EARL and JOHN JOHNSON,

as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; con-

trary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [5]

And the said United States Attorney for the said Western District of Washington further informs the Court:

COUNT IV.

That prior to the commission by the said

JOHN EARL, *alias* JACK EARL,

of the said offense of transporting intoxicating liquor herein set forth and described in manner and form as aforesaid, and

JOHN EARL, *alias* JACK EARL,

on the 22d day of May, 1922, in cause No. 6810, at Seattle, in the United States District Court for the Western District of Washington, Northern Division, was duly and regularly convicted of the offense of transporting intoxicating liquor on the 13th day of May, 1922, in violation of the said Act of Congress known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

THOS. P. REVELLE,
United States Attorney.
J. W. HOAR,
Special Assistant United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jan. 24, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [6]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL and JOHN JOHNSON,

Defendants.

ARRAIGNMENT AND PLEA.

Now, on this 10th day of March, 1924, the above defendants come into open court accompanied by their attorney J. L. Finch, and say their true names are John Earl and John Johnson. Whereupon the reading of the information is waived and each defendant here and now enters his plea of not guilty.

Journal No. 12, page No. 93. [7]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL and JOHN JOHNSON,

Defendants.

MOTION TO QUASH SEARCH-WARRANT AND TO SUPPRESS EVIDENCE.

Come now the defendants, John Earl and John Johnson, and move the Court for an order quashing the search-warrant issued by United States Commissioner A. C. Bowman upon which this proceeding is founded, and suppressing all evidence gained by reason or use thereof.

This motion is made for the reason and upon the grounds that said search-warrant and the affidavit upon which same was founded, was and is invalid, and is based upon the records and files of this court and the affidavits of John Earl and John Johnson filed herewith in support hereof.

J. L. FINCH,
Attorney for Defendants.

Recd. copy of above motion acknowledged this 17 day of April, 1924.

THOMAS P. REVELLE, BM.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Apr. 17, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [8]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL and JOHN JOHNSON,

Defendants.

AFFIDAVIT IN SUPPORT OF MOTION TO QUASH SEARCH-WARRANT AND TO SUPPRESS EVIDENCE.

United States of America,
State of Washington,
King County,—ss.

John Johnson and John Earl, being first duly sworn, on oath depose and say:

That they are the defendants above named and make this affidavit in support of their motion to quash the search-warrant and to suppress evidence obtained by means thereof.

Affiants say that on the 28th day of December, 1923, one Gordon B. O'Harra, a federal prohibition agent for the District of Washington, made application before Honorable A. C. Bowman, a United States Commissioner for the Western District of Washington, for a search-warrant, and in support

of such application filed with said Commissioner an affidavit, a copy of which is as follows:

"United States of America,
Western District of Washington,
Northern Division,—ss.

APPLICATION AND AFFIDAVIT FOR SEARCH-WARRANT.

Gordon B. O'Harra, being first duly sworn, on his oath deposes and says: That he is a federal prohibition agent duly appointed and authorized to act as such within the said District; that a crime against the Government of the United States in violation of the National Prohibition Act of Congress was and is being committed, in this, that in the City of Seattle, County of King, [9] State of Washington, and Division above named, one Bennie Goldsmith, Dave Viess, J. Engel and John Doe Greenberg, true name to affiant unknown, on the 27th day of December, 1923, and thereafter was, and is possessing, transporting, and selling intoxicating liquor, all for beverage purposes; and that in addition thereto affiant made investigation of 2011 E. Terrace on above date and saw said persons above named enter the basement of said building and load something into a Ford car, but on account of darkness, affiant could not describe; that said packages were taken to New Avon Hotel; that both 2011 E. Terrace and New Avon Hotel have been reported as bootlegging joints and all the above persons engage in bootlegging business exclusively; that on Dec. 28, 1923, affiant saw several

persons enter and leave said basement above referred to. That affiant believes a large cache of liquor is kept in said basement, which is used as garage, all on the premises described as 2011 E. Terrace Ave., including the basement under same and the outbuildings on alley just South of said 2011 E. Terrace, and on the premises used, operated and occupied in connection therewith and under control and occupancy of said above parties; all being in the County of King, State of Washington, and in said District; all in violation of the Statute in such cases made and provided and against the peace and dignity of the United States of America.

WHEREFORE, the said affiant hereby asks that a Search-Warrant be issued directed to the United States Marshal for the said district, and his deputies, and to any federal prohibition officer or agent, or deputy in the State of Washington, and to the United States Commissioner of Internal Revenue, his assistants, deputies, agents or inspectors, directing and authorizing a search of the person of the said above-named persons, and the premises above described, and seizure of any and all of the above-described property and intoxicating liquor, materials, containers, papers and means of committing the crime aforesaid, all as provided by law and said Act.

(Signed) GORDON B. O'HARRA.

Subscribed and sworn to before me this 28 day of Dec., 1923.

(Signed) A. C. BOWMAN,
United States Commissioner Western District of Washington."

That on the same day the said Commissioner acting upon said application and affidavit, and relying solely thereon, caused a search-warrant to be issued and placed in the hands of the said Gordon B. O'Harra, as a federal prohibition agent for said District, for service, a copy of which is as follows:

"United States of America,
Western District of Washington,
Northern Division,—ss.

SEARCH–WARRANT.

The President of the United States to the Marshal of [10] the United States for the Western District of Washington, and His Deputies, or Either of them, and to Any Federal Prohibition Officer or Agent, or the Federal Prohibition Director of the State of Washinton, or Any Federal Prohibition Agent of Said State, and to the United States Commissioner of Internal Revenue, His Assistants, Deputies, Agents or Inspectors, GREETING:

WHEREAS, Gordon B. O'Harra, a federal prohibition agent of the State of Washington, has this day made application for a Search-Warrant and made oath in writing, supported by affidavits, before the undersigned, a Commissioner of the

United States for the Western District of Washington, charging that a crime is being committed against the United States in violation of the National Prohibition Act of Congress by one Bennie Goldsmith, Dave Viess, J. Engel and John Doe Greenberg, true name to affiant unknown, who was, on the 27 day of December, 1923, and is, at said time and place, possessing, transporting and selling intoxicating liquor, all for beverage purposes, on certain premises in the city of Seattle, County of King, State of Washington, and in said District, more fully described as 2011 E. Terrace Ave., including the basement under the same and the outbuildings on alley just South of said 2011 E. Terrace, and on the premises used, operated and occupied in connection therewith and under the control and jurisdiction of said above parties;

AND WHEREAS, the undersigned is satisfied of the existence of the grounds of the said application, and that there is probable cause to believe their existence,

NOW, TH,EREFORE, YOU ARE HEREBY COMMANDED, and authorized and empowered in the name of the President of the United States to enter said premises with such proper assistance as may be necesary, in the day-time or night-time, and then and there diligently investigate and search the same and into and concerning said crime, and to search the person of said above-named persons, and from him or her, or from said premises seize any or all of the said property, documents, papers and materials so used in or about

the commission of said crime, and any and all intoxicating liquor and the containers thereof, and then and there take the same into your possession, and true report make of your said acts as provided by law.

GIVEN under my hand and seal this 28 day of Dec., 1923.

(Signed) A. C. BOWMAN,
United States Commissioner Western District of Washington."

That afterwards and on the 29th day of January, 1924, the said Gordon B. O'Harra, returned said search-warrant to the said Commissioner with his return of service endorsed thereon, a copy of said return being as follows: [11]

"RETURN OF SEARCH-WARRANT.

Returned, this 29 day of Jan. A. D. 1924.

Served, and search made as within directed, upon which search I found:

23 cases & 6 1/5 Gals. of Whiskey & Gin.

1 Dodge Tour, Auto.

1 Key and lock.

Papers.

and duly inventoried the same as above, according to law.

(Signed) GORDON B. O'HARRA.

I, Gordon B. O'Harra, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

(Signed) GORDON B. O'HARRA.

Subscribed and sworn to before me this 29 day of Jan., 1924.

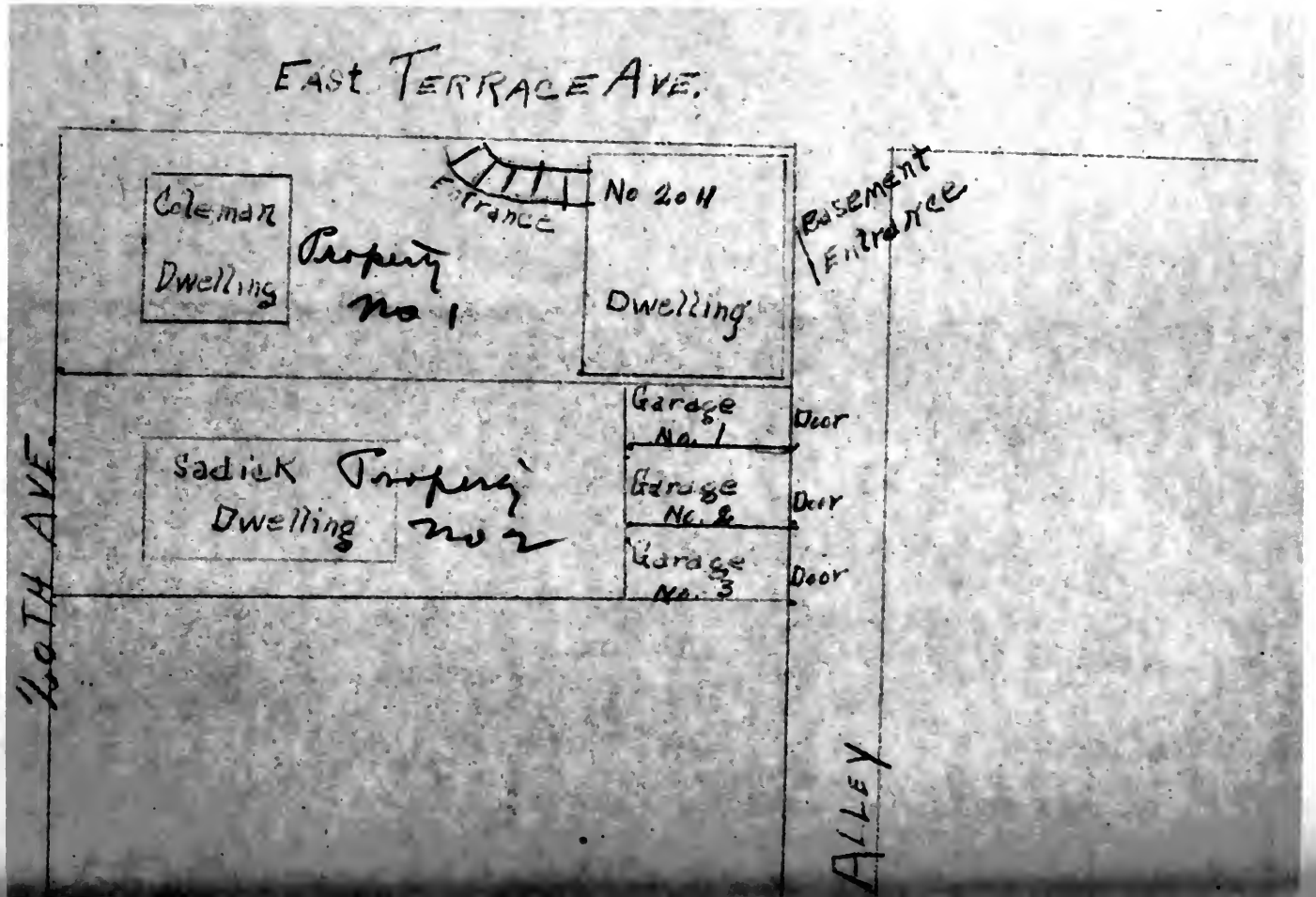
_____,

United States Commissioner.

Affiants further say that neither Bennie Goldsmith, Dave Viess, J. Engel or John Doe Greenberg, or any other Greenberg, had anything to do with any of the properties or any portion thereof referred to in the application for search-warrant or in the search-warrant itself.

That neither of said parties, collectively or individually, were using, operating or occupying the said premises or any of them or any portion of any of them, or otherwise had any connection therewith at the time said affidavit was made or said search-warrant served, or at all.

That affiants have examined the sketch on the following page and say that the same is an approximately accurate sketch, drawn approximately to scale, of the premises involved herein. [12]


EAST TERRACE AVE.
Coleman
Dwelling
Property
No 1
Entrance
No 204
Dwelling
Easement
Entrance
Garage
No 1
Door
Garage
No. 2
Door
Garage
No. 3
Door
Sadick Property
Dwelling
No 2
20TH AVE.
ALLEY

That East Terrace Avenue runs east and west and 20th Avenue runs north and south. That the two lots shown on the sketch are 40 feet in width. That the corner lot marked "Property No. 1" is owned by a man named Coleman, who lives in the house shown on the front of the lot. That a second dwelling-house or residence, is located on the extreme rear or east end of the lot, occupying the entire width thereof, and facing East Terrace Avenue and bounded on the east by an alley, all as shown on the sketch. That this residence is known as "No. 2011 East Terrace Avenue," and is the property referred to in the affidavit of O'Harra, filed in support of his application for a search-warrant, and again referred to in the search-warrant itself.

That a basement is located under said No. 2011, and that East Terrace Avenue so slopes from 20th Avenue eastward that said basement on the east side thereof is at grade and sufficiently high that it may be, and at all times herein mentioned was used as a garage, the entrance thereto being from the alley, as shown in the sketch.

That the basement, or garage, is a property separate and distinct from the residence No. 2011 East Terrace Avenue, the said residence being rented by said Coleman to a party not a party to this action or referred to in the search-warrant, and the basement or garage being rented to these affiants.

That "Property No. 2" shown on the sketch, is likewise a 40 foot lot, having a dwelling located on the front thereof, as shown in the sketch. That the rear of said lot is occupied by a series of three

garages with entrances on the alley and marked on the sketch, "No. 1," "No. 2," and "No. 3."

That "property No. 2" is owned by Jake Sadick, who at all times herein mentioned, occupied the same with his family. That garage "No. 2" was reserved by him for use of himself and family, [14] and at all times herein mentioned was used by them as a family garage.

That garages "No. 1" and "No. 3" were rented by said Sadick to different parties, not parties to this action, nor being any of the parties mentioned in the search-warrant or the application therefor.

That at the time of making the search referred to in return of search-warrant, to wit, on the 28th day of December, these affiants were in said basement, or garage, and the door thereto was closed and locked. That in said garage was an automobile, said automobile belonging to the affiant, John Johnson, and in said automobile was a quantity of intoxicating liquor.

That while these affiants were in said garage, and while the door was locked, Gordon B. O'Harra, being the officer referred to in said search-warrant and having the same in his possession for execution, accompanied by other federal prohibition officers, knocked upon said door and demanded admission. That these affiants opened the door, and said O'Harra, thereupon appraised affiant that he had a search-warrant for searching the said premises, and said O'Harra and the other prohibition officers accompanying him were thereupon allowed by affiants to make a search thereof.

That said officers found said liquor and seized the

same and the automobile in which the same was stored and at the same time arrested this affiant and his codefendant, said John Earl.

That afterwards the said prohibition officers searched the three garages located on Property No. 2. Further affiant sayeth not.

JOHN EARLE.
JOHN JOHNSON.

Subscribed and sworn to before me this 8th day of May, 1924.

IRENE DYCHES,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service accepted May 8, 1924.

THOS. P. REVELLE,
M. M.,
U. S. Atty.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 8, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [15]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN EARL and JOHN JOHNSON,
Defendants.

HEARING ON MOTION TO QUASH SEARCH-WARRANT AND TO SUPPRESS EVIDENCE.

Now on this 19th day of May, 1924, this cause comes on for hearing on motion to quash search-warrants and to suppress the evidence and said motion is denied with exception allowed.

Journal No. 12, page No. 227. [16]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN EARL and JOHN JOHNSON,
Defendants.

TRIAL.

Now on this 21st day of May, 1924, the above defendants come into open court for trial accompanied by their counsel, J. L. Finch, whereupon a jury was empanelled and sworn as follows: J. H. Elliott, Norris L. Finnestad, Vincent F. Bishop, B. F. Rothenberg, E. T. Harris, Chas. Praggs, William Neilly, Ella Tisdale, William Counter and Thomas W. Blakney. The jury is admonished and excused to 2 P. M., at which time all are present and in their box. Roll-call is waived and trial is resumed. Witnesses for the Government are sworn and examined as follows: Government witnesses are sworn and examined as follows: Gordon B.

O'Harra and Pickett. Government exhibits numbered 1, 2, 3, 4, 5, 6, 7, 8, 9 and 10, are introduced as evidence. Government moves that Counts II and IV be dismissed, which is done. Defendants move that the case be taken from the jury and dismissed for the reason of an unlawful seizure under search-warrants and insufficient legal evidence. Said motion is denied and exception allowed. Whereupon the case is submitted without argument and the jury after being charged, retired for deliberation. Thereafter jury returned into open court and all are present. Roll-call is waived and a verdict is returned and reads as follows: "We, the jury in the above-entitled cause, find the defendant, John Earl, guilty as charged in Count I of the information herein; and further find the defendant, John Johnson, is guilty as charged in Count I of the information herein; and further find the defendant, John Earl, is guilty as charged in Count III of the information herein; and further find the defendant John Johnson is guilty as charged in Count III of the information herein. Ben F. Rothenberg, Foreman."

Jury is ordered discharged and sentence continued to June 2, 1924.

Journal No. 12, page No. 237. [17]

In the District Court of the United States for the Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL and JOHN JOHNSON,

Defendants.

VERDICT.

We, the jury in the above-entitled cause, find the defendant, John Earl, is guilty as charged in Count I of the information herein; and further find the defendant, John Johnson, is guilty as charged in Count I of the information herein; and further find the defendant, John Earl, is guilty as charged in Count III of the information herein; and further find the defendant, John Johnson, is guilty as charged in Count III of the information herein.

BEN F. ROTHENBERG,

Foreman.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 21, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [18]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

MOTION FOR NEW TRIAL.

Come now the defendants in the above-entitled cause, John Earl and John Johnson, by J. L. Finch, their attorney, and moves the Court for an order setting aside the verdict of the jury heretofore rendered herein, and granting to the defendants a new trial for the reasons and upon the grounds:

a. The verdict is contrary to the law of the case.

b. The verdict is not supported by any legal evidence in the case.

c. The Court upon the trial of the case admitted incompetent evidence offered by the United States.

d. The Court erred in refusing to direct a verdict of not guilty at the close of the Government's evidence.

e. The Court erred in refusing to direct a verdict of not guilty at the close of all the evidence.

Dated this 28th day of May, 1924.

J. L. FINCH,
Attorney for Defendants.

Service accepted May 27, 1924.

THOS. P. REVELLE,
M. M.,
U. S. Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 28, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [19]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,
Defendants.

MOTION IN ARREST OF JUDGMENT.

Come now the defendants, John Earl and John Johnson by their attorney J. L. Finch and moved the Court for an order in arrest of judgment upon the verdict of the jury heretofore rendered herein, upon Count I of the information, for the reasons and upon the grounds that the charge against these defendants in Count I of said information, to wit, the possession of intoxicating liquor is included in the charge against the defendants contained in Count III of the information, to wit, the transportation of the same intoxicating liquor, upon both

of which counts the jury found these and both of them guilty.

Dated this 28th day of May, 1924.

J. L. FINCH,
Attorney for Defendants.

Service accepted May 27, 1924.

THOS. P. REVELLE,
M. M.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. May 28, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [20]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN EARL and JOHN JOHNSON,
Defendants.

HEARING ON MOTION IN ARREST OF JUDGMENT AND MOTION FOR NEW TRIAL.

Now, on this 2d day of June, 1924, this cause comes on for hearing on motion in arrest of judgment upon Count I which is argued and denied. Motion for new trial is argued and denied and sentence for both defendants are passed at this time.

Journal No. 12, page No. 255. [21]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL,

Defendant.

SENTENCE (JOHN EARL).

Comes now on this 2d day of June, 1924, the said defendant into open court for sentence, and being informed by the Court of the charges herein against him and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by paying a fine of $150.00 Dollars on Count I and a fine of $150.00 on Count III. That execution issue therefor, and that he be placed in the custody of the U. S. Marshal until such fine is paid or until he shall be otherwise discharged by due process of law.

Judgment and Decree Book No. 4, page 129. [22]

In the United States District Court for the Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN JOHNSON,

Defendant.

SENTENCE (JOHN JOHNSON).

Comes now on this 2d day of June, 1924, the said defendant John Johnson into open court for sentence and being informed by the Court of the charges herein against him and of his conviction of record herein he is asked whether he has any legal cause to show why sentence should not be passed and judgment had against him and he nothing says save as he before hath said. Wherefore, by reason of the law and the premises, it is considered, ordered and adjudged by the Court that the defendant is guilty of violating the National Prohibition Act and that he be punished by paying a fine of $150.00 Dollars on Count I and a fine of $150.00 Dollars on Count III. That execution issue therefor and that he be placed in the custody of the U. S. Marshal until such fine is paid or until he shall be otherwise discharged by due process of law.

Judgment and Decree Book No. 4, page 139.

[23]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendant.

PETITION FOR WRIT OF ERROR.

To the United States District Court for the Western District of Washington, Northern Division, and to the Honorable EDWARD E. CUSHMAN, Judge Thereof:

Comes now the above-named defendants, John Earl and John Johnson, and by their attorney and counsel respectfully shows that on the 21st day of May, 1924, a jury impanelled in the above-entitled court and cause, returned a verdict finding the defendants above named, and both of them, guilty of the charge in Count I of the information contained, and guilty of the charge in Count 3 of the information contained, which information was theretofore filed in the above-entitled court and cause and thereafter, and within the time limited by law, under rules and orders of this Court, said defendants, and both of them, moved for a new trial, which said motion was by the Court over-

ruled and exception thereto allowed; and likewise within said time filed their motion for arrest of judgment upon Count I of said information which motion was by the Court overruled and to which an exception was allowed; and thereafter on the 2d day of June, 1924, said defendants were by order and judgment and sentence of the above-entitled Court, in said cause, sentenced as follows: The said John Earl to pay a fine in the sum of One Hundred Fifty [24] ($150.00) Dollars on Count I of the information and the further sum of One Hundred Fifty ($150.00) Dollars on Count III of the information; the said John Johnson to pay a fine in the sum of One Hundred Fifty ($150.00) Dollars on Count I of the information and the further sum of One Hundred Fifty ($150.00) Dollars on Count III of the information.

And your petitioners feeling themselves aggrieved by this verdict and the judgment and sentence of the Court, entered herein as aforesaid, and by the orders and rulings of this Court, and proceedings in said cause, now herewith petition this Court for an order allowing them to prosecute a writ of error from said judgment and sentence to the Circuit Court of Appeals of the United States for the Ninth Circuit, under the laws of the United States, and in accordance with the procedure of said court made and provided, to the end that said proceedings as herein recited, and as more fully set forth in the assignment of errors presented herein, may be reviewed and manifest error appearing upon the face of the record of said proceed-

ings and upon the trial of said cause, may be by the Circuit Court of Appeals corrected, and for that purpose a writ of error thereon should be issued as by law and the rulings of the Court provided, and wherefore, premises considered, your petitioners pray that a writ of error issue to the end that said proceedings of the District Court of the United States for the Western District of Washington, may be reviewed and corrected, said errors in said record being herewith assigned and presented herewith, and that pending the final determination of said writ of error by said Appellate Court, an order may be entered herein that all further proceedings be suspended and stayed, aud that pending such final determination, said defendants be admitted to bail.

J. L. FINCH,

Attorney for Petitioners, John Johnson and John Earl, Plaintiffs in Error. [25]

Acceptance of service of within petition for writ of error acknowledged this 3d day of June, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff.
By C. T. McKINNEY.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 3, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [26]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

ASSIGNMENT OF ERRORS.

Come now the above-named defendants, John Earl and John Johnson, and in connection with their petition for writ of error in this case submitted and filed, herewith assign the following errors which the defendants aver and say occurred in the proceedings and at the trial in the above-entitled cause, and in the above-entitled court, and upon which they, and each of them, rely to reverse, set aside and correct the judgment and sentence entered herein, and say there is manifest error appearing on the face of the record and in the proceedings, in this:

1. In due and seasonable time before trial the defendants, John Earl and John Johnson, moved the Court for an order quashing the search-warrant issued by United States Commissioner, A. C. Bowman, and suppressing all evidence gained by reason or use thereof, for the reason and upon the ground that said search-warrant and the affidavit upon

which it was founded was invalid, which motion was denied by the Court, to which ruling the defendants, and each of them, then and there excepted, which exception was by the Court allowed; and now the defendants, and each of them, assign as error the ruling of the Court upon said motion. [27]

2. Upon the trial of said cause the defendants, and each of them, objected to the introduction of any evidence obtained from the execution of said search-warrant, which objection was overruled by the Court, and to which ruling of the Court the defendants, and each of them, then and there excepted, which exception was by the Court allowed; and now the defendants and each of them assign as error the ruling of the Court upon said objection.

3. At the close of the Government's case the defendants, and each of them, moved the Court to take the case from the jury and discharge the defendants, and each of them, for the reason that no legal evidence had been introduced, sufficient to warrant the case being submitted to the jury, which motion was denied by the Court, to which ruling the defendants and each of them, then and there excepted, which exception was by the Court allowed; and now the defendants and each of them, assign as error the ruling of the Court upon said motion.

4. Again at the close of all the evidence the defendants, and each of them, renewed the said motion and the Court again denied the same, to which ruling of the Court the defendants, and each of them, then and there excepted, which exception was by the Court allowed; and now the defendants, and

each of them, assign as error the ruling of the Court upon said motion.

5. Thereafter, within the time limited by law, and the orders and rulings of the Court, the defendants, and each of them, moved the Court for a new trial for the reason, *inter alia,* that the verdict was not supported by any legal evidence in the case, which motion was denied by the Court, to which ruling of the Court the defendants, and each of them, then and there duly excepted, and the exception was by the Court allowed; and now the defendants and each of them, assign as error the ruling of the Court upon said motion. [28]

6. Thereafter and before judgment, the defendants, and each of them, moved the Court for an order in arrest of judgment upon the verdict of the jury upon Count I of the information for the reason and upon the ground that the charge in Count I against said defendants, to wit, the possession of intoxicating liquor, is and was included in the charge against the defendants contained in Count III of the information, to wit, the transportation of the same intoxicating liquor, upon both of which counts the jury found said defendants guilty, which motion was denied by the Court, and to which ruling of the Court the defendants, and each of them, then and there duly excepted, and the exception was by the Court allowed; and now the defendants, and each of them, assign as error the ruling of the Court upon said motion.

7. The Court thereafter entered judgment and sentence against said defendants, and each of them,

upon the verdict of guilty rendered upon the said information, Count I thereof and Count III thereof, to which ruling and judgment and sentence the defendants excepted, which exception was by the Court allowed, and now the defendants, and each of them, assign as error that the Court so entered judgment and sentence upon said verdict.

And as to each and every assignment of error, as aforesaid, the defendants say that at the time of making of the order or ruling of the Court complained of, the defendants duly asked and were allowed an exception to the ruling and order of the Court.

J. L. FINCH,
Attorney for Defendants.

Acceptance of service of within assignment of errors acknowledged this 3d day of June, 1924.

THOS. P. REVELLE,
By C. T. McKINNEY.
Attorney for Plaintiff.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 3, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [29]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

ORDER ALLOWING WRIT OF ERROR AND FIXING AMOUNT OF SUPERSEDEAS BOND.

This matter coming on to be heard upon the petition of John Earl and John Johnson, for a writ of error herein and that further proceedings be stayed pending final determination of said writ, and that pending said final determination, said defendants be admitted to bail; the Court having read said petition and being fully advised,

IT IS ORDERED that a writ of error be and the same hereby is granted herein this 3d day of June, 1924, and it is further

ORDERED, that said defendants, John Earl and John Johnson, be admitted to bail and that the amount of the supersedeas bond to be filed by each of said defendants, be fixed in the sum of $750.00, and it is further

ORDERED, that upon said defendants, John Earl and John Johnson, or either of them, filing

his bond in the aforesaid sum in due form, to be approved by the Clerk of this Court, he, or they, shall be relieved from custody pending the determination of the writ of error herein assigned.

Done in open court this 3d day of June, 1924.

EDWARD E. CUSHMAN,
Judge. [30]

Acceptance of service of within order allowing writ acknowledged this 3d day of June, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff.
By C. T. McKINNEY.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 3, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [31]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,
Defendants.

SUPERSEDEAS BOND (JOHN JOHNSON).

KNOW ALL MEN BY THESE PRESENTS: That we, John Johnson, as principal, and National

Surety Company, a corporation of the State of New York, duly authorized to transact a general surety business in the State of Washington as surety, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of Seven Hundred Fifty ($750.00) Dollars, lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas, the above-named defendant, John Johnson was on the 2d day of June, 1924, sentenced in the above-entitled cause to pay a fine in the sum of One Hundred Fifty ($150.00) Dollars on Count I of the information and the further sum of One Hundred Fifty ($150.00) Dollars on Count III of the information, making a total fine of ($300.00) Three Hundred Dollars. [32]

And, whereas, the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit;

And, whereas, the above-entitled Court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of ——.

NOW, THEREFORE, if the said defendant John Johnson, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made, in

the premises, and shall render himself amenable to and obey all process issued, or ordered to be issued by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall pursuant to any order issued by said District Court surrender himself and obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 3d day of June, 1924.

JOHN JOHNSON, (Seal)
Principal.

NATIONAL SURETY COMPANY.
By C. B. WHITE,
Resident Vice-president.

[Seal] Attest: E. M. CLARKE,
Resident Asst. Secretary.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

Approved:
EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 3, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [33]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

SUPERSEDEAS BOND (JOHN EARL).

KNOW ALL MEN BY THESE PRESENTS: That we, John Earl, as principal, and National Surety Company, a corporation of the State of New York, duly authorized to transact a general surety business in the State of Washington as surety, are held and firmly bound unto the United States of America, plaintiff in the above-entitled action, in the penal sum of Seven Hundred Fifty Dollars lawful money of the United States, for the payment of which, well and truly to be made, we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

The condition of this obligation is such, that whereas, the above-named defendant John Earl, was on the 2d day of June, 1924, sentenced in the above-entitled cause to pay a fine in the sum of One Hundred Fifty ($150.00) Dollars on Count I of the information and the further sum of One Hundred Fifty ($150.00) Dollars on Count III of the information, making a total fine of Three Hundred ($300.00) Dollars. [34]

And, whereas, the said defendant has sued out a writ of error from the sentence and judgment in said cause to the Circuit Court of Appeals of the United States for the Ninth Circuit;

And, whereas, the above-entitled court has fixed the defendant's bond, to stay execution of the judgment in said cause, in the sum of Seven Hundred Fifty Dollars;

NOW, THEREFORE, if the said defendant, John Earl, shall diligently prosecute his said writ of error to effect, and shall obey and abide by and render himself amenable to all orders which said Appellate Court shall make, or order to be made, in the premises, and shall render himself amenable to and obey all process issued, or ordered to be issued by said Appellate Court herein, and shall perform any judgment made or entered herein by said Appellate Court, including the payment of any judgment on appeal, and shall not leave the jurisdiction of this court without leave being first had, and shall obey and abide by and render himself amenable to any and all orders made or entered by the District Court of the United States for the Western District

of Washington, Northern Division, and will render himself amenable to and obey any and all orders issued herein by said District Court, and shall pursuant to any order issued by said District Court surrender himself and obey and perform any judgment entered herein by the said Circuit Court of Appeals or the said District Court, then this obligation to be void; otherwise to remain in full force and effect.

Sealed with our seals and dated this 3d day of June, 1924.

JOHN EARL, (Seal)
Principal.

NATIONAL SURETY COMPANY.
By C. B. WHITE, (Seal)
Resident Vice-president.

[Seal] Attest: E. M. CLARKE,
Resident Asst. Secretary.

O. K.—C. T. McKINNEY,
Asst. U. S. Atty.

Approved.

EDWARD E. CUSHMAN,
Judge.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 3, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [35]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

BILL OF EXCEPTIONS.

BE IT REMEMBERED, that on the 21st day of May, 1924, at the hour of ten o'clock A. M., the above-entitled cause came regularly on for trial in the above-entitled court, before the Honorable Edward Cushman, Judge thereof, the plaintiff appearing by Thomas P. Revelle and John A. Frater, District Attorney and Assistant District Attorney, respectively, and the defendants appearing by J. L. Finch,

Thereafter a jury was regularly and duly impanelled and sworn to try said cause, and the United States Attorney having made his opening statement, the following proceedings were had;

TESTIMONY OF GORDON B. O'HARRA FOR THE GOVERNMENT.

GORDON B. O'HARRA, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FRATER.)

My name is Gordon B. O'Harra. I am a Federal Prohibition Agent and was such on December 28, 1923, stationed at Seattle. I am acquainted with John Earl and John Johnson, the defendants sitting there. I participated at their arrest, December 28, 1923. It was in a basement of 2011 East Terrace Drive, in the city of [36] Seattle. They were in possession of intoxicating liquor.

Q. Of what did it consist?

Mr. FINCH.—I object to that evidence upon the ground stated in my motion to quash. I am saving the same question.

COURT.—Objection overruled.

Mr. FINCH.—Exception.

A. There were 17 cases of various kinds or brands of whiskey and gin, and those bottles marked for identification 1 to 10 inclusive were part of that liquor, and seized by me and my associates on December 28, 1923. It was about 2 o'clock in the afternoon. Agent Pickett, Prohibition Officer, was with me. Pickett and I went out to this place some time between 10 and 10:30 o'clock in the forenoon and stationed ourselves in my

(Testimony of Gordon B. O'Harra.)

automobile about two blocks east of the garage in the basement of 2011 East Terrace Drive. We stayed until about noon and then left for our lunch then came back and remained until 2 o'clock watching this garage. About 2 o'clock the defendants, Johnson and Earl, came up to the place from the north in a Dodge Touring car, which was covered with mud and heavily loaded; they pulled up to the garage and Earl got out and opened the door and they pulled in. Then as soon as they started into the garage we started our car and pulled into the alley behind them. They had the door of the garage locked. When I knocked they opened the door and I went in and served the search-warrant on defendant Earl, and placed both under arrest as soon as we saw the liquor in the car. We took the liquor and turned it over to Agent Kline, who is the custodian of all seized liquor and evidence,

Cross-examination.

(By Mr. FINCH.)

We were around waiting and watching this place from 10 or 10:30 until 2 o'clock in the afternoon. [37] The reason we did not execute the search-warrant during that period was because we were reasonably certain that there was not anybody in the garage or basement and we knew if we did search it the only thing we would get is the liquor, and that is not of the greatest importance in a liquor case, the most important thing is to get the fellow who handles it; that is why we waited; we

(Testimony of Gordon B. O'Harra.)
waited for them to come out there; we located the liquor immediately when they came. The search-warrant did not say anything about any individuals who handled it, but there are two different things to take into consideration in a search, the liquor and the fellows owning it. We did not find any liquor in the garage, all the liquor we found was in the automobile which we saw drove into the garage. It drove in but a few seconds before we arrived, the defendants had not any more than closed the door and we were right upon them. In other words, the only liquor we found was what was in the automobile driven into the garage a few seconds before we went in.

TESTIMONY OF JOHN PICKETT, FOR THE GOVERNMENT.

JOHN PICKETT, called as a witness on behalf of the Government being first duly sworn, testified as follows:

Direct Examination.

(By Mr. FRATER.)

I am John Pickett. I am a Federal Prohibition Agent, and was such on December 28, 1923. I have seen the defendants Earl and Johnson before, they were at 2011 East Terrace in this city. I was in company with Agent O'Harra. We took some liquor from those premises. There was 17 sacks of it. It was of different kinds, Scotch, bourbon and gin. The liquor was turned over to Mr. Kline,

(Testimony of John Pickett.)

the prohibition agent who has charge of all seized liquor. We took the liquor from an automobile in the basement of 2011 East [38] Terrace Avenue, which basement is used as a garage. We saw the automobile enter the garage. The defendants only had time to get out of the machine and enter the garage when we drove up. I saw the automobile from which the liquor was taken drive into the garage. The exhibits 1 to 10 inclusive are a part of the liquor taken from the automobile.

Cross-examination.

(By Mr. FINCH.)

All the liquor that we found was contained in the automobile which drove into the basement under 2011 East Terrace. There was no liquor found in the basement outside of what was in the automobile.

Witness excused.

Mr. FRATER.—Call Mr. Kline.

Mr. FINCH.—I make no question about the alcoholic contents of this stuff, whatever it is. I will admit that Mr. Kline would testify that the liquor contains more than the prohibited amount per volume and is fit for beverage purposes.

Government rests.

Mr. FINCH.—At this time we move to take this case from the jury, and to discharge the defendants, for the reasons stated in my motion to quash the search-warrant, and as the same is supplemented by the evidence in this case. It appears now, your

Honor, as it never has before, that the search-warrant was not gotten out in good faith; they were not after those premises; they had someone else in view; they got nothing out of the premises, but they arrested these defendants who were in nowise identified with the case up to that time; they used other men's names alleging them to be the owners [39] of the premises and the occupants of it; these defendants were strangers to the search-warrant and to the affidavit filed in support of it,—strangers to the men named therein. It appears now that the agents simply used this search-warrant as a sort of license to do as they pleased; and I think the showing made in my motion to suppress, supplemented as it is with the evidence now given in the case, is sufficient to warrant your Honor taking the case from the jury for the want of any legal evidence.

The COURT.—Motion denied; exception allowed.

Mr. FINCH.—Defendants rest. It is, of course, understood that I renew my motion after resting.

The COURT.—Motion denied; exception allowed.

Mr. FRATER.—I move to dismiss Count II and IV of the information, some error was committed in filing those counts.

Whereupon the jury retired to deliberate upon their verdict.

Thereafter on the same day the said jury returned into court and rendered their verdict, finding the defendants, and each of them, guilty upon the first and third counts of the indictment.

Thereupon the defendants duly filed their written motion now on file herein praying that the ver-

dict of the jury be set aside and a new trial granted. them.

The defendants also duly filed their written motion in arrest of judgment as to each of said defendants on Count I of said information, for the reason and upon the ground that the offense charged herein, namely; the possession of intoxicating liquor, was and is included in Count III of said information, to wit, the transportation of the same liquor.

Thereafter on the 3d day of June, 1924, said motion for new trial came duly on for hearing before the Court and after argument of counsel the Court denied the same. To which ruling of the [40] Court the defendants, and each of them, excepted, and their exception was by the Court allowed.

Thereafter and on the same day the said motion in arrest of judgment came duly on for hearing before the Court, and after argument of counsel the Court denied the same. To which ruling of the Court the defendants, and each of them, excepted, and their exception was allowed by the Court.

Whereupon the Court did pronounce sentence upon the defendants, to wit, that the defendant John Earl be fined One Hundred Fifty ($150) Dollars upon Count I of said information and One Hundred Fifty ($150) Dollars upon Count III of said information; and that the defendant John Johnson be fined One Hundred Fifty ($150) Dollars upon Count I of said information and One Hundred Fifty ($150) Dollars upon Count III of said information.

And, now, in furtherance of justice, and that right may be done, the said defendants, John Earl and John Johnson, tenders and presents to the Court the foregoing as their bill of exceptions in the above-entitled cause and pray that the same may be settled and allowed and signed and sealed by the Court and made a part of the record in this case.

J. L. FINCH,
Attorney for Defendants.

Service of copy hereof hereby acknowledged this 23d day of June, 1924.

THOS. P. REVELLE,
F. M. S.
U. S. District Attorney.

Bill of exceptions allowed and certified.

EDWARD E. CUSHMAN,
Judge.

O. K.—JOHN A. FRATER,
Asst. U. S. Atty.

[Endorsed]: Lodged in the United States District Court, Western District of Washington, Northern Division. Jun. 23, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy.

[Endorsed]: Filed in the United States District Court Western District of Washington, Northern Division. Oct. 6, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [41]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

STIPULATION EXTENDING TIME TO AND INCLUDING AUGUST 3, 1924, TO FILE RECORD AND DOCKET CAUSE.

It is hereby stipulated and agreed between the parties to the above-entitled action that the time within which the defendants shall make, serve and file their record in the above-entitled cause, in the Circuit Court of Appeals, be and the same is hereby extended to and including the 3d day of August, 1924.

Dated this 1st day of July, 1924.

THOS. P. REVELLE,
Attorney for Plaintiff.
J. L. FINCH,
Attorney for Defendants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 1, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [42]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

ORDER EXTENDING TIME TO AND INCLUDING AUGUST 3, 1924, TO FILE RECORD AND DOCKET CAUSE.

For good cause shown and in accordance with stipulation on file herein, it is

ORDERED that the time within which the defendants shall make, serve and file their record in the above-entitled cause, in the Circuit Court of Appeals, be and the same is hereby extended to and including the 3d day of August, 1924.

Done in open court this 1st day of July, 1924.

WM. H. SAWTELLE,
United States District Judge.

O. K.—JOHN A. FRATER,
United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jul. 1, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [43]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

STIPULATION EXTENDING TIME TO AND INCLUDING SEPTEMBER 20, 1924, TO FILE RECORD AND DOCKET CAUSE.

It is hereby stipulated and agreed between the parties to the above-entitled action that the time within which the defendants shall make, serve and file their record in the above-entitled cause, in the Circuit Court of Appeals, be and the same is hereby extended to and including the 20th day of September, 1924.

Dated this 2d day of August, 1924.

THOS. P. REVELLE,
JOHN A. FRATER,
Attorneys for Plaintiff.
J. L. FINCH,
Attorney for Defendants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Aug. 4, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [44]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

ORDER EXTENDING TIME TO AND INCLUDING SEPTEMBER 20, 1924, TO FILE RECORD AND DOCKET CAUSE.

For good cause shown and in accordance with stipulation on file herein, it is:

ORDERED that the time within which the defendants shall make, serve and file their record in the above-entitled cause, in the Circuit Court of Appeals, be and the same is hereby extended to and including the 20th day of September, 1924.

Done in open court this 2d day of August, 1924.

WM. H. SAWTELLE,
United States District Judge.

O. K.—JOHN A. FRATER,
Asst. United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Aug. 4, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [44½]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

STIPULATION EXTENDING TIME TO AND INCLUDING OCTOBER 20, 1924, TO FILE RECORD AND DOCKET CAUSE.

It is hereby stipulated and agreed between the parties to the above-entitled action that the time within which the defendants shall make, serve and file their record in the above-entitled cause, in the Circuit Court of Appeals, be and the same is hereby extended to and including the 20th day of October, 1924.

Dated this 18th day of September, 1924.

J. W. HOAR,
Attorney for Plaintiff.
J. L. FINCH,
Attorney for Defendants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 18, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [45]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

ORDER EXTENDING TIME TO AND INCLUDING OCTOBER 20, 1924, TO FILE RECORD AND DOCKET CAUSE.

For good cause shown and in accordance with stipulation on file herein, it is:

ORDERED that the time within which the defendants shall make, serve and file their record in the above-entitled cause, in the Circuit Court of Appeals, be and the same is hereby extended to and including the 20th day of October, 1924.

Done in open court this 18th day of September, 1924.

JEREMIAH NETERER,
United States District Judge.

O. K.—J. W. HOAR,
Special Asst. United States Attorney.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Sep. 18, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [46]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

PRAECIPE FOR TRANSCRIPT OF RECORD.

To the Clerk of the Above-entitled Court:

You will please make a transcript of the record on appeal to the Circuit Court of Appeals of the Ninth Circuit, in the above-entitled cause and include therein the following:

Information.

Arraignment.

Plea.

Motion to quash search-warrant and to suppress evidence.

Affidavit in support of motion to quash search-warrant and to suppress evidence.

Order on motion to quash search-warrant and to suppress evidence.
Record of trial and impanelling jury.
Verdict.
Motion for new trial.
Motion in arrest of judgment.
Hearing on motion in arrest of judgment.
Judgment and sentence.
Petition for writ of error.
Assignment of errors.
Order allowing writ of error and fixing amount of supersedeas bond. [47]
Two supersedeas bonds.
Bill of exceptions.
Order settling bill of exceptions.
Three stipulations, orders extending time to file record.
Writ or error.
Citation.
Defendant's praecipe.

J. L. FINCH,
Attorney for Defendants.

I waive the provisions of the Act approved February 13, 1911, and direct that you forward typewritten transcript to the Circuit Court of Appeals for printing as provided under Rule 105 of this Court.

J. L. FINCH,
Attorney for Defendants.

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Oct. 9, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [48]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL and JOHN JOHNSON,

Defendants.

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD.

United States of America,
Western District of Washington,—ss.

I, F. M. Harshberger, Clerk of the United States District Court for the Western District of Washington, do hereby certify this typewritten transcript of record, consisting of pages numbered from 1 to 48, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause as is required by praecipe of counsel filed and shown herein as the same remain of record and on file in the office of the clerk of said District Court, and that the same constitute the record on return to writ of error herein, from the judgment of said United States District Court for the Western Dis-

trict of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the plaintiff in error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled cause, to wit: [49]

Clerk's fees (Sec. 828 R. S. U. S. for making record, certificate or return, 106 folios at 15¢	$15.90
Certificate of Clerk to transcript of record 4 folios at 15¢.....	60
Seal to said certificate.....	20

I hereby certify that the above cost for preparing and certifying record, amounting to $16.70, has been paid to me by attorney for plaintiff in error.

I further certify that I hereto attach and herewith transmit the original writ of error and the original citation issued in this cause.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, at Seattle, in said District, this 10th day of October, 1924.

[Seal] F. M. HARSHBERGER,
Clerk United States District Court Western District of Washington. [50]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

WRIT OF ERROR.

The United States of America,—ss.

The President of the United States of America, to the Honorable Judges of the District Court of the United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in said District Court before the Honorable Edward E. Cushman, between John Earl and John Johnson, the plaintiffs in error, and the United States of America, the defenant in error, a manifest error hath happened to the prejudice and great damage of John Earl and John Johnson, plaintiffs in error, as by their complaint and petition herein appears, and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this

behalf, DO COMMAND YOU, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, at the city of San Francisco, State of California, together with this writ, so that you have the same at said city of San Francisco within thirty days from the date hereof, in said Circuit Court of Appeals to be [51] then and there held, that the record and proceedings aforesaid being then and there inspected, said United States Circuit Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States of America, should be done in the premises.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, this 3d day of June, 1924, and the year of the Independence of the United States, one hundred and forty-seven.

[Seal] F. M. HARSHBERGER,
Clerk of the District Court of the United States for the Western District of Washington.

Acceptance of service of within writ of error, acknowledged this 3d day of June, 1924.

THOS. P. REVELLE,
U. S. Atty.,
Attorney for Plaintiff.
By C. T. McKINNEY,
Asst. U. S. Atty. [52]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern

Division. Jun. 3, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [53]

United States District Court, Western District of Washington, Northern Division.

No. 8240.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

JOHN EARL, *alias* JACK EARL, and JOHN JOHNSON,

Defendants.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to THOMAS P. REVELLE, United States Attorney for the Western District of Washington, Northern Division, GREETING:

You are hereby cited and admonished to be and appear before the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, in the State of California, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the Western District of Washington, Northern Division, wherein John Earl and John Johnson, are plaintiffs in error, and the United

States of America is defendant in error, to show cause, if any there be, why judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable EDWARD CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Northern Division, this 3d day of June, 1924.

EDWARD E. CUSHMAN,
United States District Judge.

[Seal] Attest: F. M. HARSHBERGER,
Clerk of the District Court of the United States,
for the Western District of Washington. [54]

Acceptance of service of within citation on writ of error acknowledged this 3d day of June, 1924.

THOS. P. REVELLE,
U. S. Atty.
Attorney for Plaintiff.
By C. T. McKINNEY,
Asst. [55]

[Endorsed]: Filed in the United States District Court, Western District of Washington, Northern Division. Jun. 3, 1924. F. M. Harshberger, Clerk. By S. E. Leitch, Deputy. [56]

[Endorsed]: No. 4362. United States Circuit Court of Appeals for the Ninth Circuit. John Earl and John Johnson, Plaintiffs in Error, vs. United States of America, Defendant in Error. Tran-

script of Record. Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

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Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4362

IN THE
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN EARL and JOHN JOHNSON,
Plaintiffs-in-Error,

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error.

BRIEF OF PLAINTIFFS IN ERROR.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

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STATEMENT OF THE CASE.

Plaintiffs in error were informed against in Count I of the information for having and possessing 192 gallons of whiskey, 12 gallons of gin and 3 pints of beer; and in Count III of the information with transporting the same liquor. Appellant, John Earl, was charged in Count II of the information with having been previously convicted of the offense of possession of liquor; and in Count IV with having been previously convicted of having transported liquor; but these two counts of the information were dismissed upon motion of the Government, made during the trial (Trans. p. 21).

Previous to the trial, appellants moved to quash the search warrant used in obtaining the evidence upon which the prosecution was based (Trans. p. 7), supporting the motion with the affidavit of both appellants (Trans. p. 8). This motion was denied by the court, and exception duly taken and allowed (Trans. p. 20).

At the trial appellants renewed their objection to the introduction of any evidence obtained by virtue of the search warrant, for the reason stated in their motion to suppress. This objection was

overruled and exception taken and allowed (Trans. p. 43).

No evidence was introduced by appellants on the trial, but at the close of the Government's case they moved the court to take the case from the jury, and to discharge the appellants, for want of sufficient legal evidence to convict. This motion was denied and exception allowed (Trans. pp. 46 and 47).

The motion was renewed at the close of the case, the same ruling was made and exception allowed (Trans. p. 47).

Trial resulted in a verdict of guilty as to both appellants upon counts I and III (Trans. p. 21).

Before sentence was passed both appellants moved the court in arrest of judgment upon Count I of the information, for the reason that the offense charged in Count I was included in the offense charged in Count III (Trans. p. 24). This motion was denied and exception duly taken and allowed (Trans. pp. 25 and 48).

The court then sentenced each appellant to pay a fine of $150.00 on Count I, and $150.00 on Count III (Trans. pp. 26 and 27).

Whereupon appellants sued out a writ of error to this court.

ASSIGNMENTS OF ERROR TO BE URGED HERE.

1. In due and seasonable time before trial the defendants, John Earl and John Johnson, moved the court for an order quashing the search warrant issued by United States Commissioner A. C. Bowman, and suppressing all evidence gained by reason or use thereof, for the reason and upon the ground that said search warrant and the affidavit upon which it was founded was invalid, which motion was denied by the court, to which ruling the defendants, and each of them, then and there excepted, which exception was by the court allowed; and now the defendants, and each of them, assign as error the ruling of the court upon said motion.

2. Upon the trial of said cause the defendants, and each of them, objected to the introduction of any evidence obtained from the execution of said search warrant, which objection was overruled by the court, and to which ruling of the court the defendants, and each of them, then and there excepted, which exception was by the court allowed; and now

the defendants and each of them assign as error the ruling of the court upon said objection.

3. At the close of the Government's case the defendants, and each of them, moved the court to take the case from the jury and discharge the defendants, and each of them, for the reason that no legal evidence had been introduced, sufficient to warrant the case being submitted to the jury, which motion was denied by the court, to which ruling the defendants, and each of them, then and there excepted, which exception was by the court allowed; and now the defendants, and each of them, assign as error the ruling of the court upon said motion.

4. Again at the close of all the evidence the defendants, and each of them, renewed the said motion, and the court again denied the same, to which ruling of the court the defendants, and each of them, then and there excepted, which exception was by the court allowed; and now the defendants, and each of them, assign as error the ruling of the court upon said motion.

6. Thereafter and before judgment, the defendants, and each of them, moved the court for an order in arrest of judgment upon the verdict of

the jury upon Count I of the information for the reason and upon the ground that the charge in Count I against said defendants, to wit: the possession of intoxicating liquor, is and was included in the charge against the defendants contained in Count III of the information, to wit: the transportation of the same intoxicating liquor, upon both of which counts the jury found said defendants guilty, which motion was denied by the court, and to which ruling of the court the defendants, and each of them, then and there duly excepted, and the exception was by the court allowed; and now the defendants, and each of them, assign as error the ruling of the court upon said motion.

The court thereafter entered judgment and sentence against said defendants, and each of them, upon the verdict of guilty rendered upon the said information, Count I thereof and Count III thereof, to which ruling and judgment and sentence the defendants excepted, which exception was by the court allowed, and now the defendants, and each of them, assign as error that the court so entered judgment and sentence upon said verdict (Trans. p. 31 *et seq.*).

ARGUMENT.

Assignments 1, 2, 3, 4 and 7 will be argued together, as they involve the same point, namely, the insufficiency of the showing of "probable cause" in the affidavit filed as a basis for the search warrant issued and executed, by virtue of which all the evidence in the case was obtained; and the illegality of the search warrant itself.

The Affidavit.

The affidavit is found at page 8, *et seq.* of the transcript, and we will dissect it.

> "that a crime against the Government of the United States in violation of the National Prohibition Act of Congress was and is being committed, in this, that in the City of Seattle * * * one Bennie Goldsmith, Dave Viess, J. Engel and John Doe Greenberg, true name to affiant unknown, on the 27th day of December, 1923, and thereafter was and is possessing, transporting, and selling intoxicating liquor all for beverage purposes;"

Under the ruling of this court in *United States vs. Locknane,* decided by this court November 10, 1924, No. 4314, not yet reported, this allegation is of no force or effect, no matter who was involved. But in addition thereto, it is to be noted that it was alleged and not denied that no one of the parties

mentioned had any connection of any character with any of the properties involved in the search (Trans. p. 14).

> "that in addition thereto, affiant made investigation of 2011 E. Terrace on above date and saw said persons above named enter the basement of said building and load something into a Ford car, but on account of darkness, affiant could not describe;"

It would be impossible to make a statement more devoid of fact, especially as "2011 E. Terrace" is a residence distinct from the basement (Trans. p. 17), and the "said persons" mentioned are strangers to the record.

> "that said packages were taken to New Avon Hotel; that both 2011 East Terrace and New Avon Hotel have been reported as bootlegging joints and all the above persons engaged in bootlegging business exclusively."

"Have been reported" is hearsay; and besides, the residence "2011 E. Terrace" is a residence in possession of one not the appellants, or in anywise connected with them (Trans. p. 17); and besides, appellants are not to be charged with the tainted reputation of strangers.

"that on December 28, 1923, affiant saw several

persons enter and leave said basement above referred to;"

Comment is unnecessary.

"that affiant believes a large cache of liquor is kept in said basement, which is used as a garage, all on the premises described as 2011 E. Terrace Avenue, including the basement under same and the outbuildings on alley just south of 2011 E. Terrace and on the premises used, operated and occupied in connection therewith and under control and occupancy of said above parties;"

Under all the authorities, affiant's "belief" is of no consequence; but it is necessary that he state facts upon which the court issuing the warrant can form a conclusion of his own.

It is respectfully urged that this affidavit was void of any showing of "probable cause."

The Search Warrant.

The warrant was a "general" warrant, involving several properties, rather than one confined to a property "particularly described," as required by the constitution, statutes and all the cases.

A sketch of the properties involved, drawn approximately to scale, is furnished in the transcript, at page 15.

"Property No. 1," on the corner, is owned by a man named Coleman, who lives in the front house.

In the rear on the alley is "No. 2011," referred to in the affidavit. This is rented to a man not a party to the record in anywise. Under this residence is the "basement," or garage, referred to in the affidavit. This basement, or garage, was rented to appellants, who were in possession thereof. (Trans. p. 17).

"Property No. 2," next to it, was owned by one Sadick, who lived in the residence at the front. He had three garages shown in the rear, "No. 1," "No. 2" and "No. 3." "No. 2" was reserved by him for the use of himself and family. "No. 1" and "No. 3" were rented to parties not parties to the record in anywise (Trans. pp. 17 and 18). The garages apparently were "the outbuildings on the alley just south of said "2011 E. Terrace," referred to in the affidavit and warrant.

The search warrant, then, was aimed at five different and distinct properties: the residence No. 2011; the basement, or garage, underneath; the three different garages to the south, under distinct ownerships. This makes the warrant a general warrant. not a warrant directed at a place "particularly described," as required by law.

For such reason, the warrant was void.

The affidavit was defective, and the warrant was defective. Either defect made the search and seizure unlawful; and the motion to suppress the evidence obtained thereby should have prevailed.

A reading of the record shows no evidence was offered sufficient to convict, without the use of that illegally obtained, and for the error of the court in allowing the Government to use the tainted evidence the case should be reversed.

When reversed, we think the order should be to direct the lower court to discharge appellant, because the motion to take the case from the jury and to discharge the appellants for want of sufficient *legal* evidence, made at the close of the Government's case, and renewed at the close of the entire case (Trans. p. 47) we believe to have been well taken.

ASSIGNMENT OF ERROR NO. 6.

Appellants moved the lower court in arrest of judgment upon Count I of the information, for the reason that the charge in that count, namely, possession, was included in the charge contained in Count III, namely, the transportation of the same liquor, upon both of which counts appellants had been found guilty.

The evidence was that the officers saw appellants drive an automobile into the garage. The officers immediately entered and searched the premises and the automobile. They found liquor in the automobile. None other was found on the premises. On this state of facts the Government predicated its charge of possession and its charge of transportation, both involving the same identical liquor.

Appellants contend that under the circumstances they can be punished on one count only, namely, transportation, because transportation of liquor includes the possession of the same liquor, at least in the case at bar. There was but one transaction, and both charges were proved by the same identical evidence. There was no evidence to prove one charge that was not relied upon to prove the other. Therefore, to punish for the transportation of liquor, and then to punish for the possession of the same liquor, is to inflict a double punishment for one offense.

It has been held that possession and sale constitutes but one offense.

Muncy vs. U. S., 289 Fed. 780.

It has also been held that the manufacture of

moonshine whiskey necessarily embraces the offense of having in possession the same moonshine whiskey.

Morgan vs. U. S., 294 Fed. 82.

Also see

Reynolds vs. U. S. (C. C. A), 280 Fed. 1.

Rossman vs. U. S., (C. C. A.), 280 Fed. 950.

Re Neilson, 131 U. S. 176, 33 L. Ed. 118.

In the event a reversal is not ordered, this court should order, at least, that the sentence be corrected as to both appellants, and the sentence on Count I as to each be remitted.

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UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT, FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

Brief of Defendant in Error

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Brief of Defendant in Error

STATEMENT OF THE CASE

That on December 23, 1923, at Seattle, Washington, Government prohibition agents, armed with a Federal search warrant obtained upon an affidavit and application made by one of them, were watching certain premises, known as a basement,

beneath 2011 E. Terrace Avenue, which was a garage. After lying in wait from Ten o'clock in the morning until Two o'clock in the afternoon, defendants drove up and into said garage a certain Dodge Touring Car covered with mud and heavily loaded; the agents immediately entered the garage and found seventeen sacks of various brands of whiskey and gin in the automobile, and placed the defendants under arrest. No other liquor was found on the premises.

Before and during the trial of the case, defendants sought to have this evidence excluded, upon motion therefor, and the refusal of the court to grant said motion is here assigned as error, for the consideration of the court. Defendants also contend that the charges of possession and transportation constitute but one offense, and that the penalty imposed upon them for possession should be remitted.

ARGUMENT

The Government contends that the Court committed no error in its refusal to suppress the evidence, and further contends that in view of all the circumstances surrounding this case that no search warrant was, in fact, needed.

Counsel for the defendants seeks to interpret the effect of the affidavit and application for search warrant by portions. In determining whether agent O'Harra gave sufficient facts to establish the existence of probable cause, upon which to secure a warrant for the search of this basement, the affidavit must be considered as a whole.

It is conceded by the defendants that the garage was separate and apart from the house and was not used as part of the dwelling,—hence, no question of search of a private dwelling is here involved. The affidavit referred to showed that the basement was being used for the transaction of business; that packages were hauled from there to a hotel; that both the garage and hotel had been reported by other persons to be "bootlegging joints"; that the agents knew that the persons using the garage were then actively engaged in bootlegging.

If, under the testimony presented by the Government at the trial, this court should feel that a search warrant was necessary, it is earnestly contended that the agent produced enough facts before the Commissioner to establish the existence of probable cause upon which to believe that the

garage was being used for illicit traffic in intoxicating liquor, and justified the issuance of the search warrant.

In quoting on page 9, line 18, of counsel's brief, as follows:

"And all the above persons *engaged* in bootlegging business exclusively,"

it should have read:

"And all the above persons *engage* in bootlegging business exclusively." (Tr. p. 9, line 30.)

It is not necessary in an application for a search warrant to prove a case beyond a reasonable doubt, and the mere fact that all of the persons mentioned were not caught red handed, does not indicate that they were not using the premises. There is no proof that they were not, and the affidavits of defendants in their motion to suppress is not proof that other persons mentioned were not interested in and using said basement.

Counsel for the defendants further contends that the search warrant was a general warrant, and void for the reason that it did not sufficiently describe other buildings. The Government contends otherwise, and a glance at the map (Tr. p. 15) would seem to indicate that there could be no ques-

tion as to the buildings referred to. In this case the garage is specifically mentioned and accurately described, and were the only premises entered by the agents; if the other buildings had been searched, these defendants claiming no interest in them could not be harmed. This ruling of law has been decided so many times that it hardly needs citation.

McDaniel v. U. S. (6 C. C. A.), 294 Fed. 769;

Schwartz v. U. S. (5 C. C. A.), 294 Fed. 528.

The operations in this basement were particularly described in the affidavit for search warrant and no uncertainty existed as to the basement intended.

The Government contends that in this case no search warrant was necessary. The evidence of Gordon B. O'Harra, corroborated by John Pickett (Tr. 43, 44) was as follows:

"Pickett and I went out to this place some time between 10 and 10:30 o'clock in the forenoon and stationed ourselves in my automobile about two blocks each of the garage in the basement of 2011 East Terrace Drive. We stayed until about noon and then left for our lunch, then came back and remained until 2 o'clock watching this garage. About 2 o'clock the defendants, Johnson and Earl, came up to the place from the north in a Dodge Touring

car, which was covered with mud and heavily loaded; they pulled up to the garage and Earl got out and opened the door and they pulled in. Then as soon as they started into the garage we started our car and pulled into the alley behind them. They had the door of the garage locked. When I knocked they opened the door and I went in and served the search-warrant on defendant Earl, and placed both under arrest as soon as we saw the liquor in the car."

From the foregoing evidence and the information which agents had of the use being made of these premises and of the reputation of the persons using them, together with the experience of prohibition agents in handling such cases, it cannot be said that they were acting merely on suspicion, or without probable cause to believe that the defendants were then and there engaged in the commission of a crime, either a felony or a misdemeanor, or both, and in their presence.

The defendants could have been charged with a felony, namely with having conspired together to violate the National Prohibition Act, or as in this case, with the commission of a misdemeanor. They are fortunate in having been charged only with a misdemeanor. The prohibition agents were there watching for the appearance of the automobile, and as it passed them, covered with mud and heavily

loaded with articles other than people, they would have been derelict in their duty had they not made a search of the car and arrested the defendants.

The question of search of automobiles without a warrant has been fully covered in the case of *U. S. v. Rembert*, 284 Fed. 996, and on pages 1006 and 1007, paragraph 10, appears the following:

"Under the Volstead Act, an express provision for seizure upon discovery of illegal transportation is made, and the term 'discovery,' as used in this act, is to be construed in the light of the principles of American and English common law, defining when arrests can be made without warrant; that is, when an offense occurs in the presence of an officer, and a discovery may be said to have been made by the federal officers when the evidence of their senses induces them to believe, upon reasonable grounds for belief, that an offense is being committed, and it is not necessary, if a sincere belief exists, and this belief is based upon reasonable grounds, that the officer actually see, before apprehension is made, the liquor the subject of the apprehension.

"(6) Officers should be very loth to interfere with the rights of citizens, and should not arrest on mere suspicion, and wherever an arrest and consequent search of a person or vehicle is made without warrant, the government must be prepared to show, if it expects the evidence to be admissible, that the arrest and search was not a

mere exporatory enterprise for the purpose of discovery, but was based upon a sincere belief, with reasonable grounds therefor, that an offense had been committed by the person or vehicle arrested.

"In the case at bar the court is convinced that Officer Myers had a sincere and real belief that, from the way and manner in which the car was being driven, the driver was intoxicated, and that the car was being used to transport liquor contrary to law, and while the evidence of his senses on which that conclusion was based might at first blush appear to be meager, taken in the light of the experience of the officer in arresting and apprehending persons who had been handling the brand of liquor known as 'moonshine' the court does not feel justified in holding that the officer had not probable cause for the belief engendered by the facts brought home to his senses."

In *Lambert v. United States*, 282 Fed. 413 (9 C. C. A.) at page 417, this Court said:

"The prohibition of the Fourth Amendment is against all unreasonable searches and seizures. Whether such search and seizure is or is not unreasonable must necessarily be determined according to the facts and circumstances of the particular case. We think the actions of the plaintiff in error in the present case, as disclosed by the testimony of Edison, were of themselves enough to justify the officers in believing that Lambert was at the time actually engaged in the commission of the crime defined and denounced by the National Prohibition

Act, and that they were therefore justified in arresting him and in seizing the automobile by means of which he was committing the offense—just as peace officers may lawfully arrest thugs and burglars, when their actions are such as to reasonably lead the officers to believe that they are actually engaged in a criminal act, without giving the criminals time and opportunity to escape while the officers go away to make application for a warrant."

In *Milam v. United States*, 296 Fed. 629 (4 C. C. A.) at page 631, we find the following discussion on the interpretations of the law in question in the light of present conditions:

"We are not inclined to extend the rule of exclusion of evidence obtained by unlawful search beyond the decisions of the Supreme Court. The constitutional expression, 'unreasonable searches,' is not fixed and absolute in meaning. The meaning in some degree must change with changing social, economic and legal conditions. The obligation to enforce the Eighteenth Amendment is no less solemn than that to give effect to the Fourth and Fifth Amendments. The courts are therefore under the duty of deciding what is an unreasonable search of motor cars, in the light of the mandate of the Constitution that intoxicating liquor shall not be manufactured, sold, or transported for beverage purposes. Every constitutional or statutory provision must be construed, with the purpose of giving effect, if possible, to every other constitutional and statutory provision, and in view of new conditions

and circumstances in the progress of the nation and the state. Downes v. Bidwell, 182 U. S. 244, 21 Sup. Ct. 770, 45 L. Ed. 1088; South Carolina v. United States, 199 U. S. 437, 26 Sup. Ct. 110, 50 L. Ed. 261, 4 Ann. Cas. 737; Elrod v. Moss (C. C. A. 4th Circuit) 278 Fed. 123, 129; Agnello v. United States (C. C. A. 2nd Circuit) 290 Fed. 671.

"In view of the difficulties of enforcing the mandate of the Eighteenth Amendment and the statutes passed in pursuance of it, we cannot shut our eyes to the fact known to everybody that the traffic in intoxicating liquors is carried on chiefly by professional criminals in motor cars. Robberies and other crimes are committed, and criminals escape by their use. To hold that such motor cars must never be stopped or searched without a search warrant would be a long step by the Courts in aid of the traffic outlawed by the Constitution. The argument in favor of stopping and searching without warrant motor cars in the effort to detect robbery and other crimes and to discover stolen goods is also very strong, but with that we are not now concerned. Objections to such searches made by officers with due courtesy and judgment generally come, not from citizens interested in the conservance of the law, but from criminals who invoke the Constitution as a means of concealment of crime.

"(2) Property forfeited by reason of the crime with which it is connected is not entitled to legal protection. A person in possession of forfeited property has no right to the protection of his pos-

session, and such forefited property is always rightfully subject to seizure on behalf of the government. United States v. Stowell, 133 U. S. 19, 10 Sup. Ct. 244, 33 L. Ed. 555; Taylor v. United States, 3 How. 197, 205, 11 L. Ed. 559; Boyd v. United States (4th Circuit) 286 Fed. 930; United States v. Welsh (D. C.), 247 Fed. 239.

"Search and seizure of automobiles without search warrant is enforcement of the National Prohibition Act (Comp. St. Ann. Supp. 1923, Sec. 10138¼ et seq.) has been justified on this ground. United States v. Fenton (D. C.), 268 Fed. 221; United States v. Bateman (D. C.), 278 Fed. 231; United States v. Rembert (D. C.), 284 Fed. 996. We leave in abeyance the general question of the right of an officer to search an automobile whenever and wherever he sees fit, to the end that he may obtain evidence and ascertain whether the car and liquor contained in it had been forfeited."

In *United States v. Bateman*, 278 Fed. 231 at page 233, we find the following:

"In the act of Congress approved November 23, 1921, section 6 provides as follows:

" 'That any officer, agent, or employee of the United States engaged in the enforcement of this act, or the National Prohibition Act, or any other law of the United States, who shall search any private dwelling as defined in the National Prohibition Act, and occupied as such dwelling, without a warrant directing such search, or who while so engaged shall without a search warrant maliciously

and without reasonable cause search any other building or property, shall be guilty of a misdemeanor.'

"Again, if Congress deemed it an unreasonable search and seizure in a case like the one before the court, it had a good opportunity to express its convictions, but it did not. This would seem to be a sanction by Congress to search vehicles or other buildings or property without a warrant, unless the same was done maliciously and without reasonable cause.

"It is my opinion that there is no legislation of Congress upon the subject of searches and seizures of automobiles, except as above specified, and the Court must in each individual case determine, as a judicial question, whether or not the search and seizure of an automobile is an unreasonable search or seizure, in view of all the circumstances in the case.

"(4) Let us now proceed to consider as a judicial question in this case whether or not it was an unreasonable search or seizure for the officer to have proceeded as he did without a search warrant. The Eighteenth Amendment went into force in January, 1919, and the first section reads as follows:

" 'After one year from the ratification of this article the manufacture, sale, or transportation of intoxicating liquors within, the importation thereof into, or the exportation thereof from the United States and all territory subject to the jurisdiction thereof for beverage purposes is hereby prohibited.'

"There is now and has been ever since this

amendment went into effect almost a continuous stream of automobiles from at or near the Mexican border to Los Angeles and other parts of the country. If these automobiles could not be stopped and searched without a search warrant, the country, of course, would be flooded with intoxicating liquors, unlawfully imported. It is contended that the officers have no right to stop a person carrying a suit case, or satchel, to search for intoxicating liquors, on the ground that that would be a violation of the Fourth and Fifth Amendments to the Constitution. If a suit case or satchel could not be searched and seized without a search warrant, a tin container, jug, or bottle could not be taken away without a search warrant from a man carrying it. If an automobile, a suit case, satchel, tin container, jug, or bottle could not be searched and seized without a search warrant, they could not be seized at all, as a search warrant, under the law, can only be obtained upon affidavit showing that such automobile or other container had intoxicating liquor in it. Such an affidavit cannot be made upon information and belief, but must be positively sworn to. Before a search warrant could be obtained, of course, the effect to be searched would be out of reach. Any person must necessarily reach this conclusion.

"Under those circumstances the Eighteenth Amendment would have been stillborn. * * * At the time Congress passed the last act above referred to, automobiles had been seized by the hundreds without a search warrant. Containers of alcohol had been seized by the thousands without a search

warrant. Therefore, if Congress had been of the opinion that it was contrary to the Fourth and Fifth Amendments of the Constitution for these things to be done, it is most astounding that Congress did not pass laws regulating such searches and seizures, instead of leaving it to the Courts to decide. I think the failure of Congress to act in this matter is a tacit approval of the many acts which had occurred prior to November 23, 1921, and that automobiles might be searched."

Within the past two weeks the Supreme Court of the United States has held that automobiles may be searched without a search warrant, although the case has not yet been reported and I have not the title of same at hand.

ANSWER TO ASSIGNMENT OF ERROR NO. 6

Counsel contends the charge of possession is included in the charge of transportation. The Government contends that inasmuch as it requires more testimony to prove transportation of liquor than it does to prove its mere possession, that they are distinct and separate offenses. *Massey v. U. S.*, 281 Fed. 293 (8 C. C. A.), involving a similar case, states, in paragraph 5:

"It is urged that the court erred in refusing to require the government to elect to prosecute upon

only one count contained in the information, because but one transaction was involved. There was evidence that the defendant transported intoxicating liquor in an automobile, and then carried it into a dwelling house, where he was in possession of it. The National Prohibition Act penalizes the illegal possession, as well as the illegal transportation, of such liquor. Transportation involves elements of carriage or removal from one place to another that are not involved in mere possession. Separate acts, though parts of a continuous transaction may be made separate crimes by the legislative power, as in the case of one who unlawfully breaks and enters a building with intent to steal, and thereupon does steal while in the building. Morgan v. Devine, 237 U. S. 632, 638, 640, 35 Sup. Ct. 712, 59 L. Ed. 1153; Ebeling v. Morgan, 237 U. S. 625, 630, 35 Sup. Ct. 710, 59 L. Ed. 1151; Morris v. United States, 229 Fed. 516, 521, 143 C. C. A. 584; Morgan v. Sylvester, 231 Fed. 886, 888, 146 C. C. A. 82; Burton v. United States, 202 U. S. 344, 377, 26 Sup. Ct. 688, 50 L. Ed. 1057, 6 Ann. Cas. 392. The two offenses here involved were distinct, because the evidence to support the charge of possession was not sufficient to support the charge of transportation, without proof of an additional fact. Gavieres v. United States, 220 U. S. 338, 342, 31 Sup. Ct. 421, 55 L. Ed. 489."

Singer v. U. S., 288 Fed. 695 (3 C. C. A.) par. 4;

U. S. v. Hampton, 294 Fed. 345;

Reynolds v. U. S. (6 C. C. A.), 280 Fed. 1.

From the foregoing it would appear that no error was committed in sentencing the defendants to pay a fine upon each count. It is submitted that the defendants in this case have had a fair and impartial trial, upon evidence legally secured, and that the judgment of the lower courts should be affirmed.

Respectfully submitted,

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PETITION FOR REHEARING.

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United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

JOHN EARL and JOHN JOHNSON,
Plaintiffs-in-Error,

vs.

UNITED STATES OF AMERICA,
Defendant-in-Error.

PETITION FOR REHEARING.

Upon Writ of Error to the United States District Court of the Western District of Washington, Northern Division.

J. L. FINCH,
Attorney for Plaintiffs in Error.
1026 L. C. Smith Building,
Seattle, King County, Washington.

Come now the plaintiffs in error and respectfully petition this honorable court to grant them a rehearing upon the writ of error herein.

1. The decision of the court has gone off upon a point not presented in the lower court, nor in argument to this court, nor in anywise in issue in the case. Your honors hold that a search warrant was unnecessary in view of the facts appearing upon the record, and for that reason, and for that alone, have affirmed the judgment of the lower court. Such holding under the circumstances of this case appeals to the writer as unjust, also as unwarranted in law.

It seems unjust, because the plaintiffs in error have never had a hearing upon the point. What might have been the facts had the question been an issue at the trial this court has no way of knowing. The plaintiffs in error, defendants below, made timely a motion to suppress the evidence obtained by an illegal search and seizure. The lower court denied the motion. That it was in error in so doing this court affirms in saying in its opinion "* * * but the sustaining affidavit for the warrant was insufficient to justify its issuance." The de-

fendants and their counsel relied upon this error. We do not mean to intimate that appellants could have successfully defended upon the merits, in any event; but that, because the government had no evidence other than that obtained by the illegal search and seizure, the trial was but perfunctory. The government relied upon such evidence, and poured it in. It did not claim that there were any circumstances making a search warrant unnecessary, nor offer any evidence to that effect. Such evidence as your honors have called attention to came out incidentally in introducing, and as part of, the illegal evidence. No one marked it at the time. The Government made no point of it; neither did counsel for the defendants see any point or harm in it. Nor was there any harm in it, for there was no issue framed making it germane to any thing but the merits of guilt or innocence. Had the lower court sustained the motion to suppress, and reserved the right to determine upon the trial whether a search warrant was necessary or not, then the defendants would have been on guard and would have gone into the matter fully, and the record would furnish this court with *all the facts*. But the record

shows the contrary. The defendants below, at the time of the trial, by renewing their point made in their motion, thus called their position to the attention of court and counsel. Even then neither court nor counsel advised defendants that a search without a search warrant was a question before the court. On the contrary the Government specifically showed that the entrance was made by *virtue of the warrant* (See Transcript, page 44), and relied upon such entry. They continued so to rely, even to oral argument in this court.

This court has the right to determine a case upon a theory other than that advanced by either counsel, to be sure. But it ought to be upon facts in issue, so that the evidence upon both sides is presented as fully as counsel sees fit. In this case, as reasons for decision, the court stresses three points—(1) that the car came from the north, whence the usual source of liquor in Seattle; (2) that it was mud covered; (3) that it was heavily

laden. But had these matters been in issue we could easily have shown, (1) that at the particular point in the city where this liquor was seized there is no significance in the direction whence the car came—that the topography of the city at this point is such that even the grocery delivery cars come from that direction; (2) that not alone was this car covered with mud—that every car in the city of Seattle was so decorated at that time; that to cover Seattle cars with mud is the only known reason for our excessive rains at the period of the year when this car was seized (December 28); (3) that the car was not excessively laden—that the weight of the liquor it conveyed at the time did not exceed the weight of the passengers it was built to carry, and hence the "heaven laden" feature could have no significance.

Had the points this court stresses been made by the Government even as late as upon oral argument, so that the plaintiffs in error had had even that opportunity to meet it, we would feel better contented, for we feel that had we had a chance to call your honors' attention to the facts just stated, the court would not have attached so much import-

ance to the matters mentioned in its opinion. But for the court to determine the cause against the plaintiffs in error upon a point not tried out, nor in issue, and regarding which they had no notice putting them upon guard so that negligence might be laid against them for failure to go further into the matter, seems to the writer to be unjust.

In addition to what we have said upon the injustice of the holding, it seems to us that the law supports us. We believe that it is not within the province of the court to consider what would be the law if the facts were different than the record discloses. That is to say, the entry having been made by virtue of the search warrant, all parties concerned, the Government, the defendants, and the courts, are bound by it; and all are precluded from speculating upon what would be the law had the circumstances been different.

The Government agents entered closed and locked doors, by virtue of the search warrant (Transcrip, page 44); they searched and seized by virtue of the warrant (same page), and they made return of the warrant to that effect. At page 13 of the record they say:

"Return of Search Warrant:

Returned this 29th day of Jan. A. D. 1924.

Served, and search made as within directed, upon which search I found:

23 Cases and 6 1/5 gals. of Whisy and Gin.
1 Dodge Tour. Auto.
1 Key and lock.
Papers."

and duly inventoried the same as above, according to law.

(Signed) GORDON B. O'HARA.

I, Gordon B. O'Hara, the officer by whom this warrant was executed, do swear that the above inventory contains a true and detailed account of the property taken by me on the warrant.

(Signed) GORDON B. O'HARA.

Subscribed and sworn to before me this 29th day of Jan., 1924.

.....
United States Commissioner."

An officer is bound by his return.
17 R. C. L., *"Levy and Seizure,"* pp. 231-2-3, Secs. 128, 129.
21 R. C. L., *"Process,"* pp. 1315, 1321, Secs. 62 to 70.

33 C. J., *"Intoxicating Liquors,"* p. 683, Sec. 384.

State vs. District Court, 224 Pac. 866, at 869, 870.

A state cannot contradict the return of its officer. 67 Me. 558.

Courts, too, are bound by the return.

U. S. vs. Murby, 293 Fed. 849.

U. S. vs. Casino, 286 Fed. 976, 978.

2. Upon the second point deciding that possession and transportation or liquors are distinct offences and that the law penalizes both, we have no quarrel with the court's statement of the law. But we feel that we failed to impress the court with the peculiar facts of this case, which, had we made them clearly understood, would have called for a particular application of the law to particular facts. That is to say, the possession and transportation *in this case* were so bound together that the Government could not show the one without showing the other. Your honors say "evidence to prove possession would not be sufficient to sustain the charge of transportation." That is true, as an abstract statement of the law. But applied to this case it is not accurate. The Government could not show possession in this case without showing transportation, and vice versa. All there was to the facts of

this case was that the Government agents found the liquor in the car which they saw enter the garage—transportation and possession combined, and the Government could not have related the facts about one charge without showing the other. Under those circumstances we feel that the defendants have been doubly punished. In addition to the cases cited in our brief, we add,

Raine vs. U. S., 299 Fed. 407, decided by this court.

Miller vs. U. S. 200 Fed. 529 (C. C. A. 6 Cir.).

In the *Raine* case this court noted the point we are urging here, though it was not assigned and was first called into question by counsel upon appeal. The court did not pass upon the point because the record was incomplete and failed to show the facts fully, but from what your honors did say we conclude that the point is deemed well taken whenever facts present a case for its application.

The *Miller* case presents our argument perhaps more clearly than we are able to, and we respectfully urge its consideration.

Appellants believe they have substantial cause to complain of the rulings of the lower court, and

that this court has failed to meet the questions presented by the record. We have tried to impress upon your honors wherein we feel aggrieved, and respectfully urge a reconsideration of the case.

Respectfully submitted,

J. L. FINCH,

Attorney for Plaintiffs in Error.

No. 4363

United States

Circuit Court of Appeals

For the Ninth Circuit.

WONG LUNG SING, *alias* WONG MAT,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF ATTORNEYS OF RECORD.

For Defendant and Plaintiff in Error:
M. H. HERNAN, Esq., and ROBERT B. McMILLAN, Esq., Phelan Bldg., S. F.

For Plaintiff and Defendant in Error:
UNITED STATES ATTORNEY, San Francisco.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 14,459.

UNITED STATES

vs.

WONG LUNG SING et al.

PRAECIPE FOR TRANSCRIPT ON WRIT OF ERROR.

To the Clerk of said Court:

Sir: Please prepare the transcript of record upon writ of error in the above-entitled cause:

1. Indictment.
2. Arraignment.
3. Plea of defendant.
4. Record of trial.
5. Verdict of jury.
6. Motion for new trial; order denying.

SECOND COUNT.

And the grand jurors aforesaid, on their oaths aforesaid do further present: THAT

WONG LUNG SING, *alias* WONG MAT, *alias* AH MAT, CHARLIE WONG YOU,

hereafter called the defendants, heretofore, to wit, on or about November 18, 1923, at Monterey, County of Monterey, in the Southern Division of the Northern District of California, and within the jurisdiction of this Court, then and there being, did then and there violate a requirement of the Act of December 17, 1914, as amended February 24, 1919, in that he, the said defendant, did then and there knowingly, willfully, unlawfully and feloniously purchase, sell, dispose and distribute a certain quantity of opium, to wit, fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and a certain derivative of opium, to wit, one bindle of yen shee containing 10 grains, which said smoking opium and yen shee was not then and there in nor from the original stamped packages;

AGAINST the peace and dignity of the United States of America, and contrary to the form of the statute of the said United States of America in such case made and provided.

JOHN T. WILLIAMS,
United States Attorney.

[Endorsed]: A true bill. E. L. Hoag, Foreman. Presented in open court and ordered filed Jan. 8, 1924. Walter B. Maling, Clerk. By Lyle S. Morris, Deputy Clerk. [4]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the court-room thereof, in the city and county of San Francisco, on Saturday, the 19th day of January, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable WILLIAM H. HUNT, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, sitting in the District Court.

No. 14,459.

UNITED STATES OF AMERICA

vs.

WONG LUNG SING et al.

MINUTES OF COURT—JANUARY 19, 1924—ARRAIGNMENT AND PLEA.

In this case defendant Wong Lung Sing was present in court with his attorney, F. J. Hennessy, Esq. Defendant Charles Wong You was present in custody of U. S. Marshal and with his attorney, E. A. O'Dea, Esq. J. F. McDonald, Esq., Asst. U. S. Atty., was present for and on behalf of United States.

Defendant Wong Lung Sing was arraigned and plead "Not Guilty." Ordered case continued to Jan. 26, 1924, to be set for trial.

After hearing Mr. O'Dea and Mr. McDonald, ordered plea of "Not Guilty" entered on behalf of

defendant Charlie Wong You, and case continued to Jan. 26, 1924, to be set for trial. Further ordered that the U. S. Marshal cause a medical examination (blood test) to be made of said defendant Charlie Wong You to determine his mental condition. [5]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Thursday, the 7th day of February, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable CHARLES F. LYNCH, District Judge for the District of New Jersey, designated to hold and holding this court.

No. 14,459.

UNITED STATES OF AMERICA

vs.

WONG LUNG SING et al.

MINUTES OF COURT—FEBRUARY 7, 1924—TRIAL.

This case came on regularly this day for trial of defendant Wong Lung Sing upon indictment filed herein. Said defendant was present in court with his attorneys, F. J. Hennessy and M. H. Herron, Esqs. T. J. Riordan, Esq., Asst. U. S. Atty., was present for and on behalf of the United States.

Upon the calling of the case, all parties answering ready for trial, the Court ordered that the same proceed and that the jury-box be filled from the regular panel of trial jurors of this court. Accordingly, the hereinafter named persons, having been duly called by lot, sworn, examined and accepted, were duly sworn as the jurors to try the issues herein, viz.:

J. H. Henning,	Clarence M. Henderson,
John B. Rice,	J. N. Gilman,
Robt. G. Arlett,	Matthew A. Harris,
Byron S. Arnold,	M. J. Knox,
Geo. A. Armes,	Jas. M. Patrick,
Geo. W. Acton,	W. J. Mortimer.

Mr. Riordan made opening statement to Court and jury as to nature of the case and called Phil H. Oyer, F. W. A. Cording, A. W. Roberts, Albert Elasho, each of whom were duly sworn and examined as a witness on behalf of United States, and introduced in evidence on behalf of United States certain exhibits which were filed and marked U. S. Exhibits Nos. 1 [6] (suitcase) and 2 (envelope), and rested.

Mr. Hennessy called Wong Fat Shing, who was sworn and examined for defendant. Ah Jong was sworn as interpreter. Wong Lung Sing, L. J. Lawrence and Yung Ping Chow were each duly sworn and examined for defendant, and defendant rested. The evidence was thereupon closed. Mr. Hennessy moved the Court to instruct the jury to return a verdict of not guilty upon the grounds stated, which said motion was ordered denied. After arguments by counsel and the instructions by

the Court to the jury, the jury at 3:45 P. M. retired to deliberate upon their verdict. Ordered that the jury seal their verdict and hand same to the U. S. Marshal, and return into court to-morrow morning at 10 A. M. [7]

In the Southern Division of the United States District Court, in and for the Northern District of California, First Division.

No. 14,459.

UNITED STATES OF AMERICA

vs.

WONG LUNG SING, *alias* WONG MAT, *alias* AH MAT.

ENGROSSED BILL OF EXCEPTIONS ON APPEAL.

BE IT REMEMBERED that heretofore, to wit, the grand jury of the United States District Court did find and return into and before the above-entitled court its indictment against the above-named defendant and thereafter the said defendant appearing in court and being called upon to plead to the said indictment, pleaded "Not Guilty" as shown from the record herein and the said cause being at issue, the same came on for trial before the Honorable Charles F. Lynch, a United States District Judge, and a jury, duly impaneled, the United States of America being represented by

(Testimony of Phil H. Oyer.)

Thomas J. Riordan, Esq., Assistant United States Attorney, and the defendant being represented by Frank J. Hennessy, Esq., and M. H. Herman, Esq., the following proceedings were had:

TESTIMONY OF PHIL H. OYER, FOR THE GOVERNMENT.

PHIL H. OYER, a witness called for the United States of America, being duly sworn, testified as follows:

My name is Phil H. Oyer. I am a deputy sheriff of Monterey County, California. I knew the defendant Wong Lung Sing, *alias* Wong Mat, only by sight. I saw him on November the 18th, 1923. I was coming from Salinas, I should judge about three o'clock in the afternoon, somewhere between two and three, and this defendant and another defendant was driving along in an Oldsmobile sedan. We followed them about fifteen miles—Traffic Officer Elasho and myself, and were going to pinch them for speeding; we got within a mile of the city limits of Monterey and [8] this defendant got up and pulled the curtains down in the car, in the rear of the car, and I went past him and turned my machine around, and they lit out for Monterey; we overtook them about a mile down the road, and as they were exceeding the speed limit we placed them under arrest. Mr. Elasho took charge of the car, and I took that suitcase there with the opium in it —I didn't know what was in it at the time—and

(Testimony of Phil H. Oyer.)

he wanted to know if we had a search-warrant for that suitcase, and I told him no, we had no search-warrant; we arrested him for speeding. We went to Monterey and turned it over to the chief of police, who got a search-warrant and found the opium in the case. That is the suitcase, or one that looked like it. There are two keys here. I examined the contents of the suitcase at that time at the chief of police's office after a search-warrant was obtained. That is the same contents. These cans and this blanket were the contents that I observed at that time.

Mr. RIORDAN.—I will ask, if your Honor please, that this be marked Government's Exhibit 1 for identification.

The COURT.—Let it be marked.

(The suitcase was marked Government's Exhibit 1 for Identification.)

Witness resumes: I was present at the conversation in the jail between the defendant, Mr. Riordan and other police officers. There were present Deputy District Attorney Fred Treat, Justice of the Peace Michaels, Chief of Police Cording, Traffic Officer Elasho, and I think later on the Police Commissioner was there.

Q. Were any questions asked of the defendant by any of those parties present? A. Yes.

Q. What was said there?

Mr. HENNESSY.—I would like to ask a question.

Q. Did you have an interpreter?

(Testimony of Phil H. Oyer.)

A. No interpreter, no; did not need any. [9]

Q. This man can talk English, can he?

A. Talked good English; I could understand him.

Mr. RIORDAN.—He does not now, does he, Mr. Hennessy?

Mr. HENNESSY.—He speaks very poor English.

Mr. RIORDAN.—Q. Just state to the Court and jury what was said at that time.

A. Well, he said he knew nothing of the opium, the contents of the valise or suitcase, that somebody put it in his car at Pajaro, and we asked him where the key was, and he said he had no keys; we asked him who the overcoat belonged to,—Mr. Cording asked him who the overcoat belonged to, and he said it did not belong to him. Mr. Cording searched his person, and I think in one of his coat pockets he found two keys that belonged to the suitcase.

Mr. HENNESSY.—I move to strike out what the witness thinks. He said he thinks.

The COURT.—Strike that out.

Witness resumes: I observed the search by the police officers of the defendant Wong Mat. I saw what the officers obtained from the defendant. They found two keys, a hypodermic needle, and some opium on a card or wrapped up in a paper, I think it was yen shee, they call it. On the initial opening of the suitcase, it was opened by the police officers. Traffic Officer Elasho had a key at that time, a skeleton key, or some key that would fit it.

(Testimony of Phil H. Oyer.)

He opened it with that. Afterwards we found these these two keys on the person of the defendant. That opened the suitcase. The defendant was in an Oldsmobile sedan.

Prior to the 18th of November, 1923, I had seen a car that looked similar to that sedan. The place that I saw this car stop on this particular night of the arrest there was a big hedge with buildings on the inside of it, with a little opening that runs [10] through a heavy cypress hedge. I think that the Chinese help from the Del Monte Hotel stop there or had their headquarters there. There are bunk-houses and cottages there. On a previous occasion I had seen one of the cars there, I don't know whether it was this car or not. It was a closed car; I could not tell you whether it was a Buick or what it was.

Before the suitcase was opened at the jail the defendant told me that he was cutting fish in the cannery and was going to see his cousin, Wong Chong, and he had his rubber boots in this suitcase and knife and was going down to cut fish at the cannery.

Cross-examination.

(By Mr. HENNESSY.)

I could not state positively when this occurred; it was along about the 18th of November. It was on a Sunday afternoon. I was in an automobile accompanied by Traffic Officer Elasho. We saw the automobile about fifteen miles from where the arrest was made. It was on the highway on the

(Testimony of Phil H. Oyer.)

county road between Castroville and Monterey. We followed the automobile. At times we were 50 feet, maybe 100 yards from the automobile. There were other machines in the road at that time and place passing us, coming toward us. The sedan was a five-passenger car, it had a front seat and a rear seat. It was a closed Oldsmobile car. There were two men in the Oldsmobile sedan. They occupied the front seat. I don't know the name of the man who was driving the sedan automobile. He is a small China boy; I don't know what his name was. I could not tell you if it was Charley Wong You. He was arrested with this defendant. Going along the county road the defendant was occupying the front seat with the driver. As we came into Del Monte, coming into the city limits, or this side of Del Monte, this defendant got up and got on the back seat and pulled the curtains of the sedan down. He pulled the curtain down in the rear window. [11] I could not tell you whether the sides of the car were still open, because we were going right along and passed him. I did not notice whether or not there were any curtains on the side of the car. We drove up and they slowed down at this place, as I say, where I saw a car two weeks ago or two weeks previous to that—they slowed down and the defendant got up and pulled the curtain down. I went past him, I was going at a pretty good speed, I should judge I went past him 100 yards. I was in an automobile with the other officer. They came to slow down and we

(Testimony of Phil H. Oyer.)

passed them, and I went down the road a hundred yards and turned my machine around to go back and see who they were and what they were doing, and the driver lit out with his machine, and I had to turn around and we overtook them about a mile down the road, coming into the city limits of Monterey. We stopped them. Charley Wong You and the defendant were occupying the front seat in the machine when we stopped them. The small Chinaman of the two was driving the sedan automobile. The defendant was sitting alongside of the driver. We drove up and they were exceeding the speed limit. Mr. Elasho whistled his car to slow down, and I stopped, and he jumped off the running-board of my car before I could stop it, went back to the car, and placed them under arrest. I should judge he placed the two of them; I was not there at the time. I was down the road trying to stop my car. I was about 50 yards down the road and he went up to the car and they wanted to know what was the matter. I was back by that time; after I got my car stopped I came back to the car. I did not turn around. I left my car parked down the road and came back on foot. Mr. Elasho put them under arrest for speeding, exceeding the speed limit. I should judge he arrested the two of them, I don't know whether he did or not. I know he was talking to this man when I got there and said to him, "What have you got in the suitcase?" and he said, "I don't know." He addressed this to the [12] defendant here. The suitcase

(Testimony of Phil H. Oyer.)

was lying in the bottom of the sedan. In the rear, in front of the back seat. It was not under the back seat. It was lying where the footboard was in the back of the car. In front of the back seat. There was nothing over the suitcase. The suitcase was closed. He said, "What have you got in the suitcase?" And he said, "I can't say; I don't know." This Chinaman here said that. This one did most of the talking at that time. Then Elasho said, "I will find out," and he said, "You have not got any search-warrant to find out." This Chinaman here said that. So Elasho said, "That will be all right, we have no search-warrant, but I will arrest you for speeding, we will take you to town until we get a search-warrant." I took the suitcase out of his car, put it in mine, and Mr. Elasho took charge of the Oldsmobile sedan and went into town, and I turned the suitcase over to Chief of Police Cording. I don't know whether the Chinaman drove the sedan automobile to town. I was ahead of him. I don't know who drove the car in. I went on in to town, got hold of the chief of police, and he immediately got a search-warrant and searched the suitcase. I met the chief of police and the police commissioner on the corner, and I asked them to come up to the office. I was not accompanied by the defendant. The defendant was in the custody of the traffic officer. I had the suitcase. I took the suitcase along with me. Mr. Cording went and got a search-warrant from Justice of the Peace Michaels. I did not exactly have

(Testimony of Phil H. Oyer.)

the suitcase in my possession all of this time. The suitcase was lying on the desk at the Chief of Police's office. The defendant was there a minute or two after I got there, he followed me right into town. Both of the defendants and the police officer, also. And they got a search-warrant and opened the suitcase. The suitcase was right on the desk of the chief of police's office when it was opened. At Monterey. Well, I guess [13] the chief of police opened the suitcase. I think Elasho first opened the suitcase with his keys. He is the traffic officer. He had a lot of keys, I think, and he finally found one that fit, and without breaking it open unlocked it. I hardly think the defendant had been searched prior to that time, I don't know. The defendants were not searched on the county road when they were placed under arrest on the highway, not to my knowledge, they were not. They then opened the suitcase and found the contents as it stands there now. There was an overcoat in the car. I did not see any overcoat in the car. I saw the overcoat when we came to the chief of police's office. It was lying across the top of this suitcase. I did not personally search the defendants Charley Wong You and Wong Lung Sing. I was in the room, there, when they were searched. I saw them searching them. The chief of police searched them. His name is Cording, I think his initials are F. W. I saw Chief of Police Cording find the key on the defendant Wong Lung Sing. He found the key in his coat pocket. He found

(Testimony of Phil H. Oyer.)

two keys on a string. He found the keys in a coat pocket of the defendant Wong Lung Sing, in his top coat, not in his overcoat. The coat was on him at the time. I am pretty positive of that, yes. I hardly think the keys were found in the overcoat, I am not positive, but I hardly think so. I did not personally search him. I saw the keys and Cording told me he got them out of his coat pocket.

Mr. HENNESSY.—I move to strike out what he told him.

The COURT.—Strike out what he told him.

Witness resumes: The defendant at that time denied this opium belonged to him. He also denied that the suitcase belonged to him, he denied everything. I don't remember if he stated that he got aboard this car at Watsonville. I do not know in whose name this car was registered, or the identification card on the car, whose name it was in. I did not make any record of it at the time. [14] I do not know whether or not it was in the name of the defendant Wong Lung Sing. At no time did I see the defendant Wong Lung Sing driving this car, the Oldsmobile sedan. The defendant Wong Lung Sing, and the other Chinaman were both placed under arrest at that time and brought to the chief of police's office.

Redirect Examination.

When this defendant and his codefendant were first arrested this defendant denied that he owned the suitcase. At no time in my presence did the

(Testimony of Phil H. Oyer.)

defendant admit that he owned the suitcase. He said rubber boots and a knife were in the suitcase and that he was going to work at the cannery cutting fish. After I stopped in front of the hedge, when the defendants left, they went at a greater speed than they had when we were following them before that.

TESTIMONY OF F. W. A. CORDING, FOR THE GOVERNMENT.

F. W. A. CORDING, a witness for the United States of America, being first duly sworn, testified as follows:

I am the chief of police of the city of Monterey. I know the defendant Wong Lung Sing, *alias* Wong Mat, by sight. I knew him on or about the 18th day of November, 1923. The man was brought in with a charge of reckless driving, and under suspicion of carrying contraband drugs, opium, and stuff like that; he was brought before me and I asked him what he had in the suitcase, and he told me he had clothes in there, and that he was going to work in a cannery. He said he was going to work in a cannery in Monterey, that he was going to stop at 809 Ocean Avenue, at a place called the Wong Chong Hotel, and I asked him to open the suitcase, and he told me that he did not have the key. I asked him if he was satisfied if I opened the suitcase, and he told me to get a search-warrant, and I turned and immediately went in a car

(Testimony of F. W. A. Cording.)

to the district attorney's office, and brought him to the office, and he made out an affidavit for a search-warrant, and got the search-warrant and took it over to the justice [15] of the peace's house and swore to it and came back, and while I was searching his body for his keys, Officer Elasho tried some of his keys and found one of them to fit the suitcase. I found two keys on the defendant; one fit the suitcase and one was smaller, on a string. I found these keys in his coat pocket, not an overcoat, an outside coat pocket like this. And I found a small can of opium, a hypodermic needle, and a small quantity of yen shee. When I opened the suitcase I found the blanket was over the top, and there were 52 tins of opium wrapped up in newspaper and tied with string. These look to be the same ones that I observed at that time. On every one of these cans was marked "F. W. A. Cording." I have got my mark on every one of them. The marks are still on some of them. I had a conversation with the defendant. It was all in English. He seems to speak very good English. I could understand him readily.

It was stipulated by the attorney for the defendant that the contents of the cans were opium.

Witness resumes: I tried one of the keys on this suitcase and it opened it. It was one of the keys that I took off this defendant. It was on a string. One of the keys was smaller than the other. One opened the suitcase, that is it.

(Testimony of F. W. A. Cording.)

Cross-examination.

(By Mr. HENNESSY.)

I was the one that opened the case itself. The traffic officer unlocked it. His name is Elasho. He used to be a traffic officer, he is no more. At the time of the arrest he was a traffic officer and one of his keys opened this suitcase. The defendant had not been searched prior to that time. He was not searched until we came in with the warrant. When they were first brought in, the defendants were booked on a charge of speeding, reckless driving. The driver Charley Wong You. The defendant Wong Lung Sing had not been booked on any charge, he was held on [16] suspicion. They were brought into my office first at about 3:25. Then I went and got a search-warrant. I came back with the search-warrant about four o'clock. During all of this time the suitcase was in my office under the supervision of the deputy sheriff and traffic officer. After I returned with the search-warrant the suitcase was opened in the presence of the officers, and prisoners, and district attorney. The conversation that I have testified to occurred prior to the opening of the suitcase and prior to my getting the search-warrant. At the conversation were present Officer Oyer, Elasho and myself and the two Chinese and a fellow by the name of Smith. There was no interpreter present. The conversation took place in the English language. At that time this defendant, Wong Lung Sing, had not been booked on any charge. I saw an overcoat

(Testimony of F. W. A. Cording.)

there. It was brought in by Elasho at the same time he brought in the defendants. I searched the overcoat. I did not find any keys in the overcoat. I found two keys in the coat pocket of defendant. I found two on a string. I examined this automobile, the Oldsmobile sedan. It was not registered in anybody's name, there was no identification card. I did not make an examination in whose name the car had been registered. I turned the car over to the Federal Government; I seized the car in the name of the Government.

Redirect Examination.

After I finished examining the suitcase I locked it up. I immediately had the district attorney telephone Mr. Smith, federal narcotic agent at San Francisco, and he sent Officer Roberts down the following day to take the property in his possession, as well as the car. The following day a narcotic officer came down and took the suitcase. Marshal Holohan seized the car. I found some yen shee in the pocket of the defendant, Wong Lung Sing. It was a very small quantity and a very little bit of it. It was in small [17] bindles. I found it in his coat pocket, in one of his coat pockets. I asked him what he was doing with it, and he told me he was eating it, he was an opium smoker, to keep his nerves quiet. It was a very small quantity of what they call yen shee, about a thimble full. There was also a small can of opium about the size of a spool. I found that in the coat pocket of the defendant Wong Lung Sing. He told me that he had it for

(Testimony of F. W. A. Cording.)

his own use. This yen shee is the ashes of opium that has been smoked and taken out of the pipe, the remains of the pipe. He did not deny that the yen shee was his. He said it was his. I also found a hypodermic needle on him.

TESTIMONY OF A. W. ROBERTS, FOR THE GOVERNMENT.

A. W. ROBERTS, a witness called for the United States of America, being first duly sworn, testified as follows:

I am a narcotic inspector in the internal revenue service for San Francisco Division. I recognize the suitcase and contents there. I first saw it in the city of Monterey, on the 19th of November, 1923. I received orders from my superior officer to proceed to Monterey and confer with Chief of Police Cording concerning a case which they had made against some Chinese. I saw the chief of police *and turned* over the suitcase and contents to me. I brought it to our office, 244 Postoffice Building, and then I received orders from my superior officer to take it to the United States chemist, which I did. It has been in our office in the safe custody of the narcotic agent in charge ever since. This is the bindle of yen shee and this is the hypodermic needle found on the defendant.

It was stipulated by counsel that it was yen shee.

Mr. RIORDAN.—I will ask that this be introduced in evidence and marked Government's Exhibit 2.

(Testimony of Albert Elasho.)

(The articles were marked Government's Exhibit 2.)

TESTIMONY OF ALBERT ELASHO, FOR THE GOVERNMENT.

ALBERT ELASHO, a witness called for the United States of America, being first duly sworn, testified as follows:

I resided [18] in Monterey on the 18th day of November, 1923, and was at that time a traffic officer and police officer of the city and county of Monterey. I knew the defendant Wong Lung Sing, *alias* Wong Mat, who sits there. I saw him on the 18th of November and one or two days after that. Mr. Oyer and myself were coming from a turkey shoot at Blanco. We came out of this shoot into the main highway and we observed a car going along with two Chinese in it, a closed car, and when they saw me they got to acting kind of suspicious. After we observed them they kind of stopped and hesitated and looked around; they acted like they wanted to turn around, wanted to turn the car around and go back. This defendant and the other Chinese were in the machine. It was at a railway crossing, where the Southern Pacific and narrow gauge cross there, and there is a road sign there telling the different directions, one road going toward Salinas, and one going toward Monterey, and the other going toward Blanco, this little town that we were coming from. That is where we first saw the car with the two Chinese in. So I thought we

(Testimony of Albert Elasho.)

might follow them in; I did not have anything that I could arrest them on, they had not violated any traffic ordinance, or anything. I had heard something in connection with this car or this defendant before. On the strength of what I had heard, I followed the car on that day. We followed him along the highway for about 12 or 14 miles, possibly 15 miles, to Monterey, south, and we got to about a mile outside of Monterey, just outside of the city limits, and they came to a hedge; inside of this hedge is a Chinese vegetable garden, and some Chinese are living in there all the time. There are Chinese quarters for men to live in there. The car stopped there, and this man, Wong Lung Sing, was sitting up in the front seat with the driver, and immediately after the car stopped he climbed over the seat and got in back of the car and pulled the two side curtains and the rear down—the side [19] curtains to the side of the road, pulled them down, so we speeded up to get up and see what they were going to do, and while we were doing that he turned around and saw us and they immediately started out again, and speeded upon to about 45 or 50 miles an hour, and then I arrested them on a charge of speeding. After I arrested them I stopped them and asked them to get out of the car and I searched the person of this man, this Chinese, here, and I found a little can of opium, a small quantity, and some yen shee in his vest pocket; then I asked him what he had in his suitcase and he said he had a knife, and some boots, and some clothes,

(Testimony of Albert Elasho.)

that he was going to work in the cannery. So I told him I would like to look into the suitcase and he said, "No, you no lookee, you no catchem search-warrant." This Chinaman said that. I said, "All right, we go town and I catchem search-warrant." He said, "No, you no catchem." Anyhow, I arrested him, and the suitcase was taken out of the car by deputy sheriff Oyer and put in his car and drove it into town, and I got in the car with the two Chinese and drove in just behind him; I got to the office about the same time, the chief of police's office, Mr. Cording, and informed him of what we had, and he went up to the district attorney's office and justice of the peace, and got a search-warrant and a complaint, and while they were gone I asked this Chinese here if he had a key, and he said, "No," so I had a key that opened a suitcase almost like his with me, so I tried it, to see if it would open it, but I never opened the case at all, just tried the lock to see if the key would work, and in the meantime the chief of police came back, and the district attorney, and the justice of the peace with the warrant, and were searching for keys and could not find them, so I told them I had a key that would open it, and the district attorney told me to open the case, and when we opened the case we found the cans of opium all wrapped up, [20] they were wrapped in twos, fours, and sixes, in packages; they were then arrested, and after the arrest was made the chief of police searched the person of this Chinese again and found a hypoder-

(Testimony of Albert Elasho.)

mic needle and the two keys to the suitcase, that opened this suitcase. He found them in the pocket of the coat of said Chinese, an inside coat, a short coat. I did not hear any conversation between the defendant and any person there present, that I remember of.

Q. Was he asked in your presence by anybody there—

Mr. HENNESSY.—I object to this as leading.

The COURT.—Just a minute. Let him finish the question.

Mr. RIORDAN.—Q. Was he asked in your presence by anybody there as to what was in the suitcase?

Mr. HENNESSY.—I object to that as leading. He has already said he did not hear any conversation.

Mr. RIORDAN.—If your Honor please, I have exhausted his memory, and that is just the purpose of this, I want to show—

The COURT.—The counsel has a right to object. The objection is overruled.

Mr. HENNESSY.—Note an exception.

A. Yes, I asked him myself what he had in the suitcase, and he said he had a knife and some boots in there, and he was going to go to work in a cannery. I first asked him that just after we got in the city limits of Monterey, where I stopped the car and arrested them on a speeding charge. That was before we came to the chief of police's office.

Mr. RIORDAN.—Q. Did you hear any other

(Testimony of Albert Elasho.)

conversation between the defendant and anybody else in your presence, of the same nature?

Mr. HENNESSY.—I object to that as leading and already asked and answered. [21]

The COURT.—I will permit it.

Mr. HENNESSY.—Exception.

Witness resumes: The chief of police asked him, before he opened the suitcase, what was in there, and he said there were clothes in there, and a knife, some rubber boots and some clothes, that he was going to work in a cannery at Monterey.

Cross-examination.

(By Mr. HENNESSY.)

Witness resumes: I stopped the car about a quarter of a mile from Monterey. I placed the driver Charley Wong under arrest. He was a Chinese. I arrested him on a speeding charge. I should judge he is about 21 or 22, around there, I don't know. He was driving this Oldsmobile sedan at all times that I saw it on the road. When I stopped the car, I directed the driver and also Wong Lung Sing to get out of the car, I wanted to search them. I asked them if they would get out of the car, and they got out. I searched the defendant Wong Lung Sing at that time. I found a little can of opium. I didn't go through all of his pockets. The vest pocket I searched and the hip pockets for a gun. I did not search his coat pockets. I found the small can of yen shee in the vest pocket. I overlooked searching his front coat pocket because I was sat-

(Testimony of Albert Elasho.)

isfied when I found that little can with a small quantity of opium and yen shee that I had a perfect right to arrest him. When I searched him on the roadside, I did not find any key on his person, I did not look for any. I never had my hand in his coat pocket at all. I saw an overcoat in the car over the suitcase. I subsequently saw that coat in the chief of police's office. When I was in the chief of police's office, I did not see the chief of police or somebody direct this defendant to put the overcoat on. I did not see him put the overcoat on. I did not see that the overcoat was too tight for him. I don't remember seeing [22] him with the overcoat on at all. I was there at all times. I was present when the chief of police produced the keys which he testified to in this courtroom; I saw him take the keys out of the pocket; that was after the case had been opened. He said, "Here is the key," he found the key. I don't know whether these keys were taken out of that overcoat, I couldn't say. As a matter of fact, the first I saw of the keys was they were in the hands of the chief of police; he immediately spoke about having the keys as soon as he had the keys; he said, "Here are the keys now." He had the short coat in his hand, just taking his hand out of that short coat pocket. I did not see him take any keys out of the pocket, but he had his hand in the pocket. This other Chinese who was arrested also was driving the car. He spoke English pretty well. I think this man spoke the better.

(Testimony of A. W. Roberts.)

Redirect Examination.

I first saw this overcoat in the back of the car, the Oldsmobile car. The overcoat was on top of the suitcase. He took the suitcase and left the overcoat in there.

TESTIMONY OF A. W. ROBERTS, FOR THE GOVERNMENT (RECALLED).

A. W. ROBERTS, being recalled by the Government, testified as follows:

All of these narcotics that were found were unstamped, in illegal condition.

Mr. RIORDAN.—That is the Government's case.

Mr. HENNESSY.—For the purpose of the record, at this time I would move for a directed verdict of not guilty, upon the grounds that it has not been established that this defendant—

The COURT.—I do not think it proper to make such a motion unless the defendant rests.

Mr. HENNESSY.—I also intended to renew it at the end.

The COURT.—You may renew it at the end of your case.

Mr. RIORDAN.—You have stipulated as to the contents of the [23] suitcase?

Mr. HENNESSY.—Yes.

Mr. RIORDAN.—I offer that in evidence as Government's Exhibit 1.

Mr. HENNESSY.—We object to it on the ground it is immaterial, irrelevant and incompetent, it has not been connected up with this defendant, Wong

(Testimony of Wong Fat Shing.)

Lung Sing, and was seized as the result of an illegal and improper and unreasonable search and seizure of property at the time of the arrest.

The COURT.—It will be admitted and marked.

Mr. HENNESSY.—Note an exception.

TESTIMONY OF WONG FAT SHING, FOR DEFENDANT.

WONG FAT SHING, a witness called for the defendant, being first duly sworn, testified as follows:

I speak just a little bit of English. My name is Wong Fat Shing. I reside at 51 Ross Alley, San Francisco. I am in the exporting and importing business. I was the owner of an automobile on the 18th day of November, 1923. I just buy that Oldsmobile from J. W. Leavitt & Co. It was an Oldsmobile automobile, a top car, a sedan car. This is the contract, the 9th of November. I know a man named Charley Wong You. He teach me to drive the car. I don't know how to drive the car and he teach me. I knew him before in China as a small boy; we go to school in China, and when I come back here I know him, too. I know him in China before about 16 years, something like that. I know his father, too. Charley Wong You taught me to drive the automobile the first few days. He taught me on Saturday the 17th. Saturday night he come to teach me at my store. I didn't have any conversation with him with reference to the use of the car on the following Sunday; he didn't ask me. About

(Testimony of Wong Fat Shing.)

11 o'clock Saturday night I put the car in garage and go home to sleep.

Mr. HENNESSY.—I would ask for the use of an interpreter.

(Thereupon Ah Jong was sworn as interpreter.)

[24]

Charley Wong You did not ask me if he could have the use of my car on the following Sunday. He didn't give back the key to me Saturday night. He keep the key to my automobile. I keep my automobile in the garage on Pacific Street, near Grant Avenue. Charley Wong You drove the machine on the morning of November 18, Sunday, but I didn't know about it. I did not have my machine in my possession at any time on November 18, 1923. I didn't know that anybody had taken my machine from the garage on November 18, 1923. The machine has never been returned to me. I didn't know what became of my Oldsmobile sedan. This is the contract of purchase that I entered into with J. W. Leavitt & Co. for the purchase of this Oldsmobile sedan. I have got the license here. This is my identification card for this Oldsmobile. It was an old license.

Mr. RIORDAN.—I will object to the contract; I see no purpose in it.

Mr. HENNESSY.—It is simply to identify the ownership of the car in this man.

The COURT.—I do not think it is necessary to encumber the record with all of these documents. He testified he owned the car, and that is sufficient.

(Testimony of Wong Lung Sing.)

Mr. HENNESSY.—I would make the offer.

Mr. RIORDAN.—We object to it.

The COURT.—The objection is sustained.

Mr. HENNESSY.—Note an exception.

The COURT.—If the ownership of this car is a point in issue, of course that is a different proposition.

Mr. RIORDAN.—We make no point in this case as to the ownership of this car.

TESTIMONY OF WONG LUNG SING, FOR DEFENDANT.

WONG LUNG SING, the defendant, being first duly sworn, testified as follows: [25]

Mr. HENNESSY.—I would ask for an interpreter.

Mr. RIORDAN.—I would like to try him out.

The CLERK.—What is your name?

A. Wong Lung Sing.

Witness resumes: I reside in San Francisco, Chinatown, at hotel, Pacific Street, 537. I dry apple in Watsonville. I have been in the business of drying apples at Watsonville for three or four months, or five months—four or five months—five or six—five months. On the 18th of November, 1923, I stay at Watsonville. I was in Watsonville on November 17, 1923. I live in Watsonville. I was in Watsonville on the night of November 17, 1923. I live in Watsonville.

Q. Had you been in Watsonville continuously for

(Testimony of Wong Lung Sing.)

four or five weeks previous to the 18th of November, 1923?

Mr. RIORDAN.—He does not know what "continuously" means.

The COURT.—You did not want to have an interpreter, and cannot object to the use of the words.

Mr. RIORDAN.—I think we will take the interpreter.

Mr. HENNESSY.—Very well.

(Thereupon Ah John acted as interpreter.)

Witness resumes: I was in the Bing Kong Tong on November 17th of night-time. On the night of November 17, 1923, there was a celebration at the Bing Kong Tong for establishing a new building at Watsonville. I was in Watsonville all night on the night of November 17 and the morning of the 18th of November, 1923. I saw Charley Wong You, the codefendant in this case, on November 18th, at one o'clock noon in Chinatown at Watsonville. I had known Charley Wong You about four or five months, or six months, prior to that time. Charley Wong You had an automobile with him when I met him in Chinatown, Watsonville, on November 18, 1923, about one o'clock noon. I don't know the name of the machine, but I see some glass in the machine. It was a closed car. I saw Charley Wong You [26] in the machine and asked him where he go, and he said, "I go to Monterey." I said, "You go to Monterey, I will go with you to see my uncle in Monterey." I went with him about a little after one o'clock. Charley Wong was driv-

(Testimony of Wong Lung Sing.)

ing the automobile. I am not able to drive an automobile. This automobile did not belong to me. I did not take any suitcase or any package with me when I went in the automobile with him at Watsonville. When we were stopped by the traffic officer the officer told him to stop. I get out of the machine. Charley Wong You get out of the machine, too. The officer searched me as I stood by the roadside. He looked in all of my pockets. He found this small hop toy of opium, a small package of yen shee in my pocket at that time and place, referring to U. S. Exhibit No. 2. He found this hop toy of opium in this pocket (illustrating). He looked in my coat pocket. He found some keys on my person at that time. That kind of key he found. He found this bunch of keys and he took one of the small keys away. He found this bunch of keys in my pocket. I was on the roadside when he found this bunch of keys upon me.

Q. This was before you had been brought into the office of the chief of police?

A. He found that key after he saw the chief of police.

Q. Did you have any key in your coat pocket?

A. He found a key in the coat pocket in the machine, and that coat does not belong to me.

Q. What coat pocket did he find the key in?

A. It is a long overcoat.

Q. Where was the overcoat when he found the key in the overcoat pocket?

A. The coat in the machine, he found the key.

(Testimony of Wong Lung Sing.)

Q. Where was the officer when he found the key in the overcoat?

A. In the office of the chief of police.

Witness resumes: The chief of police tell me to try and put on the [27] coat, and he said the other one to try, too. He tried to put the overcoat on me. The coat did not fit me. The coat did not belong to me. I had not put the overcoat in the automobile; I didn't own it. It was in that overcoat that the chief of police found two keys. Neither of these keys belonged to me. This suitcase and its contents did not belong to me. I did not put the suitcase in the automobile. I did not know that the suitcase was in the automobile or what its contents were when I went in the machine at Watsonville to ride to Monterey. I did not make any statement to the officers or anybody else that the suitcase contained rubber boots or that I was going to work in a cannery down at Monterey. I had known Charley Wong You about seven, or eight, or nine months before November 18, 1923. He is a Chinese person and speaks English quite fluently. He brought this automobile down to Watsonville on that day and drove it from Watsonville to Monterey and he was arrested with me at the same time. I don't know whether this overcoat in which the keys were found was in the machine when I got in it. I did not have any key on my ring or any place on my person that would open this suitcase. When the chief of police found the two keys in the overcoat, I did not have the overcoat on. I first met

(Testimony of Wong Lung Sing.)

Charley Wong You at Chan Gin Long, a Chinese building in San Francisco. He belongs to the same family, the Wong family. I saw him again at Watsonville; I never met him until I saw him in Watsonville. I was never associated with him in business. He was never my partner. I did not know him very well.

Cross-examination.

(By Mr. RIORDAN.)

My name is Wong Mat. I am also known by the name of Wong Lung Sing. I was arrested for smoking opium. I paid a fine to get out of the trouble and pleaded guilty then to that charge. There was one charge only that I pled guilty to. That was [28] 1920; I almost forgot. It may be nearer 1918. I pleaded guilty two time altogether, for smoking opium, in the United States Court. I am a Chinese citizen. I live at 574 Pacific Street, San Francisco. I have lived there about three or four months. I came there along about October, 1923. Before that I lived at 918 Grant Avenue, third floor, for about two years. My business is drying apples in Watsonville. I have been drying apples since September 20, last year. I bought the apples and peeled them, and put them in the stove and dried them and also took up the booking account. Some day worked all day on the booking account and some day dry apples. I worked for a company, but I got a $1000.00 share. The company was formed for $5000.00 and I owned $1000.00

(Testimony of Wong Lung Sing.)

share. I came down to Watsonville in 1923 to carry on my business. About July or August I went down to Watsonville to form a company to buy apples. I saw Charley Wong You in the factory and I asked him where he go to and he told me that he would take a trip to Monterey and I said, "I go, too." He met me about ten minutes or fifteen minutes before he drive the machine to Monterey. I do not belong to the same tong as Charley Wong You. I didn't see Charley Wong You the night before in Watsonville. I didn't ride down from San Francisco in the machine with Charley Wong You; I always stayed in Watsonville. When I left for Monterey, I did not plan to stay over night. I wanted to see my uncle in Monterey. I was coming back to Watsonville the same night. I don't know anything about the suitcase. I didn't notice the suitcase in the machine. I didn't bring the overcoat to the jail with me. The officer told me to take the overcoat, to bring it in. I do not know where Charley Wong You is at present.

TESTIMONY OF L. J. LAWRENCE, FOR THE DEFENDANT.

L. J. LAWRENCE, a witness called for the defendant, testified as follows:

I reside at Pajaro, Monterey County, and am a constable of the Pajaro district and have been a constable of the Pajaro [29] district for five years. I have seen the defendant Wong Lung

(Testimony of L. J. Lawrence.)

Sing off and on for the past five or six months. I have seen him associated with a man that is connected there with a drier. He is known to me as Lee Bock. I saw this man Wong Lung Sing on the evening of November 17, Saturday night, at Watsonville. I saw him at Pajaro Chinatown. I saw him on the evening between the hours of eight and eleven. He was there at a christening of a child of one of the Chinese there. I saw him in that place at eleven o'clock in the evening of November 17, 1923. I saw him on the following day, the 18th of November, he was walking from Watsonville toward Chinatown, in the morning about 10 o'clock. That is the last time I saw him. I did not see this Chinaman, Charley Wong You, in Watsonville on that day, I do not know him. There was nobody with Wong Lung Sing when I saw him in the morning walking from Watsonville toward Chinatown the morning of November 18th, he was alone. That is the last time I saw him on that day.

Cross-examination.

(By Mr. RIORDAN.)

The first time I saw the defendant to recognize him was during the last five or six months, something like that, late in September, 1923. I had seen him prior to November 17, 1923, at different times around Watsonville. I used to see him quite frequently around No. 7 Chinatown. That is the place of Lee Bock, they call it. No. 7 Chinatown is not known as a hop joint, as far as I know.

TESTIMONY OF YUNG PING CHOW, FOR DEFENDANT.

YUNG PING CHOW, a witness called for the defendant, being first duly sworn, testified through interpreter Ah Jong as follows:

I live in Chinatown at Watsonville. I am a member of the company named On Lee formed to dry apples. The company is at the end of Third Street, Watsonville. I have known the defendant Wong Lung Sing about ten years. I have done business with him in that company. He has 1000 shares in that company. He is bookkeeper for the [30] company and has been associated with the conduct of the apple drying business at Watsonville during the past five months. I saw him at Watsonville on the night of November 17, 1923, in the factory. I had seen him previously on that day. I saw him in Chinatown at Watsonville on November 17, 1923, a little after 7 o'clock in the evening, I saw him on November 18 in the morning about 9 o'clock but I didn't see him afterwards at the fruit factory in Watsonville.

TESTIMONY OF LEE LUNG, FOR DEFENDANT.

LEE LUNG, a witness called for the defendant, being first duly sworn, testified through interpreter Ah Jong, as follows:

I live at 945 Grant Avenue, San Francisco. I know Charley Wong You. I did not see him on

(Testimony of Lee Lung.)

November 17, 1923, nor on November 18, 1923. Charley Wong You was born in San Francisco.

Q. Do you know whether he went to school in San Francisco?

Mr. RIORDAN.—Objected to as immaterial, irrelevant and incompetent. Charley Wong You is not on trial.

The COURT.—I will sustain the objection.

Mr. HERNAN.—Exception. That is all.

Mr. RIORDAN.—No questions.

Mr. HENNESSY.—The defendant rests.

Mr. RIORDAN.—The Government rests.

Mr. HENNESSY.—If your Honor please, for the purpose of the record at this time I would like to make a motion for a directed verdict of not guilty on each of the counts of the information on the ground that the evidence is insufficient to sustain the allegations contained in the first count, that is, that the defendant at any time committed any of the acts set forth in the first count in violation of the provisions of the act of February 9, 1909, known as the opium act, or the Jones-Miller Act; also that the evidence is insufficient to sustain the allegations of the second count of the information, that is, that the defendant committed any act in violation of the Narcotic Act. [31]

The COURT.—The motion is denied.

Mr. HENNESSY.—Exception.

(Thereupon counsel argued the case to the jury, at the conclusion of which the Court charged the jury as follows:)

CHARGE TO THE JURY.

The COURT. (Orally.)—Gentlemen of the Jury: This defendant, Wong Lung Sing, *alias* Wong Mat, *alias* Ah Mat, has been indicted by the United States Grand Jury for committing two separate and distinct offenses. Now, the fact that he has been indicted, of course, is not a criterion or should not be any criterion in any way as to his guilt or innocence. It is simply a written charge which he and all other defendants who have been indicted are called upon to meet. As I say, there is no presumption either way. When he comes into court he is surrounded by a presumption of innocence, as all defendants in criminal cases are. And that presumption continues with him, remains with him until the Government has by competent proof overcome it beyond a reasonable odubt. I shall define "reasonable doubt" to you a little later on. The burden rests upon the prosecution to establish every element of the crime with which the defendant is charged, and every element must be established to a moral certainty and beyond a reasonable doubt. If the prosecution fails to establish to a moral certainty and beyond a reasonable doubt any one of the elements of the crime with which a defendant is charged and which it is necessary to establish in order to convict, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any of the elements constituting the crime to a moral certainty and beyond all reasonable doubt, then you must find the defendant not guilty.

Now, there are two laws which the defendant is charged with violating. First, I shall take up the act of February 9, 1909, [32] as amended. Section 2, paragraph C, provides:

> "That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transporation, concealment or sale if any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined," etc.

That Act also provides:

> "That after the 1st day of April, 1909, it shall be unlawful to import into the United States opium in any form, or any preparation or derivative thereof," etc.

Section 3 of the said Act provides:

> "That on and after July 1st, 1913, all smoking opium or opium prepared for smoking found within the United States shall be presumed to have been imported after the 1st day of April, 1909, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

Section 2 of the same act, paragraph F, provides that:

> "Whenever on trial for a violation of subdivision (c) the defendant is shown to have

or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

These provisions are made a part of the law because of the difficulty of providing guilty knowledge, and renders it only necessary only that the Government prove that the defendant had, after July 1, 1913, smoking opium in his possession, when the presumption at once arises that it had been imported after April 1, 1909, and such possession imputes to the defendant a guilty [33] knowledge sufficient to warrant a conviction unless the defendant shall explain such possession to your satisfaction. If, therefore, you are satisfied from the evidence beyond a reasonable doubt that the defendant did have possession of this opium, and that it was smoking opium, then such possession will be sufficient to warrant a conviction unless the defendant has explained such possession to your satisfaction.

Now, as to the second count of the indictment, which charges a violation of the Harrison Act of December 17, 1914, as amended, that Act provides that it shall be unlawful for any person to purchase, sell, dispense or distribute any opium except in the original stamped packages, or from the original stamped package, and the absence of appropriate tax-paid stamps from any opium shall be *prima facie* evidence of a violation of that section, by the person in whose possession the same may be found.

Now, as to the definition of reasonable doubt. You have probably heard it defined in other criminal cases, but it is the duty of the Court to define a reasonable doubt in each case. The law does not throw the burden upon the defendant of proving himself innocent, except in so far as this presumption which I have just described arises. The law imposes upon the prosecution the burden of proving the guilt of the defendant beyond a reasonable doubt, and a reasonable doubt is that state of the case which, after an entire comparison and consideration of all of the evidence, leaves the minds of the jurors in that condition that they cannot say that they have an abiding conviction to a moral certainty of the truth of the charge.

I have explained the two laws which it is claimed that this defendant violated. I have stated to you that he is surrounded by the presumption of innocence until overcome to a moral certainty and beyond a reasonable doubt. I have explained reasonable doubt [34] briefly, and that leaves nothing to be stated by the Court to you except your duty with respect to your finding under the rules which I have already laid down. It is the province of the jury to decide the facts in this case. To start out with, you have some disputed facts. You have the undisputed fact that there was opium in this automobile, and that it was unstamped. You have also the undisputed fact that the defendant was in the automobile. As to the first count, regarding the transportation and concealment of opium—I am not attempting to quote all the language of the

indictment, because you will take this with you to your jury-room and read it over there—the amount of opium mentioned is 324 ounces, 15 grains, and 1 bindle of yen shee containing 10 grains. The fact in controversy is whether or not this defendant was connected in any way with the possession unlawfully of any of this opium set forth in this indictment. He denies that he was in any way so connected. The Government asserts that he was, and asks you to find that he was from all the evidence in the case. Now, it is your business to ascertain the truth of the situation from the evidence which has been adduced before you, and you have a right to consider all reasonable inferences which the evidence furnishes with regard to the true situation. Was the defendant an innocent victim of the situation which has been disclosed, or, on the other hand, was he knowingly and willfully participating in either or both of the unlawful acts already referred to? Was the opium in the automobile a mere innocent incident of his being there, also, or was the defendant exercising some dominion or control over it? On that point, I might say that the law does not state anything about ownership. "Possession" is the word used in the law, as you will recall. And in considering the evidence, you have a right to appraise the testimony with regard to keys for the suitcase which contained the opium which was [35] in the automobile; the conduct of the defendant before the time of his arrest, what he had to say when arrested, if anything; did he say anything about a

search-warrant? If so, why did he say anything about a search-warrant? Those are simply things which might occur to you in considering his guilty or innocent connection with the opium which it is admitted, or not denied, rather, was in the car.

As to the credibility, you may take into consideration, among other things, his previous record. Was the defendant's entire conduct, as disclosed by the evidence in the case, consistent with innocence, so far as the unlawful possession of this narcotic was concerned, or was it consistent with guilt? If you have a reasonable doubt it is your duty to acquit.

I have been requested by defendant to charge you in a number of respects. Some of them I have already covered. I shall read No. 4 and No. 8 and deny the others.

> "IV. You are instructed that your personal opinion as to facts not proven cannot in any manner be considered or used by you as the basis of your verdict. You may believe, as men, that certain facts exist, but as jurors, you can only act upon the evidence, introduced upon this trial, and from that evidence, and that alone, under the instructions of the Court, you must form your verdict unaided, unassisted, and uninfluenced by any private opinion or presumption or personal belief you may have, except the presumption of innocence; and that evidence, and that alone, must convince you of the guilt of the defendant to a moral certainty and beyond all reasonable

doubt, or you should render a verdict of not guilty."

"VIII. The defendant is charged in the second count of the indictment with having purchased, sold, dispensed or distributed 55 cans of opium not in or from the original stamped packages. [36] In order to find the defendant guilty under this count of the indictment, it is necessary for the Government to establish beyond a reasonable doubt each element of the offense charged. The absence of appropriate tax-paid stamps on any of the aforesaid goods shall, however, be *prima facie* evidence of a violation of the section by the person in whose possession the drugs may be found. The term 'possession' signifies the act or state of having, holding or detaining property in one's power or control; therefore, in order to find that the defendant was, at the time of his arrest, in the possession of the opium described in the indictment, it is necessary that you be satisfied beyond a reasonable doubt upon a consideration of all the evidence in the case that the defendant not only had knowledge of the presence of the opium in the car, but also that the opium was at said time in his charge or under his control."

You will take the case and render a verdict of guilty or not guilty.

A JUROR.—Might I ask the defendant one or two questions, or is it too late? There are one or

two things I want to be satisfied about in my own mind.

The COURT.—It is a novel situation. Is there any objection on the part of anybody?

Mr. HENNESSY.—I have no objection if the juror wants to ask a question.

Mr. RIORDAN.—I have not.

The COURT.—Reopen the defendant's case.

Mr. RIORDAN.—It will be understood that counsel on either side will take exception to it?

The COURT.—Yes.

TESTIMONY OF WONG LUNG SING, FOR DEFENDANT (RECALLED).

WONG LUNG SING, recalled. [37]

The JUROR.—Q. Did you pull down the curtain in the automobile?

A. The driver of the automobile told me to pull down the curtain.

The COURT.—Did he pull them down? The question asked you was, did you pull them down?

A. Yes.

The JUROR.—Q. Why did you pull them down?

A. The driver told me to pull them down.

Q. Did the driver give any reason why he wanted the curtains drawn? A. I don't know.

Q. When you pulled the curtain down in the back of the automobile didn't you see the suitcase in front of the back seat? A. I can't remember.

The JUROR.—That is all.

The COURT.—You may retire now, Gentlemen.

After the empanelment of the jury and before the Court delivered its charge to the jury, the following instructions were requested by the defendant to be given to the jury, which requested instructions were refused by the Court, which requested instructions are as follows:

I.

"I instruct you that in this case it is not incumbent upon the defendant to prove his innocence, but the burden of proof is upon the prosecution to prove the guilt of the defendant beyond a reasonable doubt and if after a consideration of all the evidence in the case you entertain a reasonable doubt as to the guilt of the defendant of the crime charged it will be your duty to bring in a verdict of not guilty." [38]

II.

"You are instructed that the indictment that has been returned by the Grand Jury is not evidence in this case and does not give rise to any presumption of guilt on the part of the defendant of the offense charged nor does it give rise to any presumption against the defendant of any kind whatsoever."

III.

"The burden rests upon the prosecution to establish every element of the crime with which the defendant is charged, and every element must be established to a moral certainty and beyond all reasonable doubt. If the prosecution fails to establish to a moral certainty and beyond all reasonable doubt any one of the elements of the crime with which

the defendant is charged, and which it is necessary to establish in order to convict, or if there remains in the minds of the jurors a reasonable doubt as to whether or not the prosecution has established any of the elements constituting the crime to a moral certainty and beyond all reasonable doubt, then you must find the defendant not guilty."

V.

"You are instructed that the defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal."

VI.

"You are instructed that the prosecution must prove the defendant guilty of the offense charged against him beyond a reasonable doubt, independent of what the defense has proven, and if the prosecution has not proven him guilty of the offense charged beyond a reasonable doubt, then I instruct you to find the defendant not guilty." [39]

VII.

"The defendant is charged in the first count of the indictment with having received, concealed and facilitated the transportation and concealment of certain opium after the same had been imported and brought into the United States, knowing the same to have been imported contrary to law. I instruct you that if you find from the evidence that, at the time of the arrest, the defendant was riding in an automobile on a public highway and that the

said opium was contained in a closed suitcase in said automobile, this evidence would not be sufficient to justify a verdict of guilty against the defendant. In order to find the defendant guilty under this count of the indictment, it is necessary that after consideration of all the evidence in the case you be satisfied beyond a reasonable doubt that the defendant, at the time and place stated in the indictment, had possession of this opium or that he in some manner received or concealed or facilitated its transportation and concealment, knowing that it had been imported into the United States contrary to law." [40]

Thereafter, on the 9th day of February, 1924, the day set by the Court for the pronouncement of sentence upon the defendant, the defendant was called to the bar of the court and asked to show cause, if any he had, why sentence should not be pronounced upon him, according to law.

Thereupon the attorneys for defendant presented to the Court a motion for a new trial on behalf of said defendant, which said motion for a new trial was in words and figures as follows, to wit:

In the District Court of the United States, in and for the Southern Division of the Northern District of California.

No. 14,459.

UNITED STATES OF AMERICA

vs.

WONG LUNG SING, *alias* WONG MAT.

MOTION FOR NEW TRIAL.

Now comes Wong Lung Sing, the defendant in the above-entitled cause, and by M. H. Hernan and Frank J. Hennessy, his attorneys, moves the above-entitled court to set aside the verdict rendered herein and to grant a new trial of said cause, and for reasons thereof, shows to the Court the following:

1. That the verdict in said cause is contrary to the law of the case.

2. That the verdict in said cause is not supported by any evidence in the case.

3. That the Court upon the trial of said cause admitted incompetent evidence offered by the United States of America.

4. That the Court improperly instructed the jury to defendant's prejudice.

WONG LUNG SING,
Defendant.
By FRANK J. HENNESSY,
M. H. HERNAN,
Attorneys for Defendant. [41]

Said motion for a new trial was duly argued by the attorneys on behalf of the defendant and was thereupon submitted to the Court for its decision, and after due consideration, the Court denied the motion for a new trial, to which ruling the attorneys for the defendant then and there duly and regularly excepted.

Thereafter, on the same day, the attorneys for the defendant presented to the Court a motion in

arrest of judgment, which motion was in the words and figures as follows, to wit:

In the District Court of the United States, in and for the Southern Division of the Northern District of California.

No. 14,459.

UNITED STATES OF AMERICA

vs.

WONG LUNG SING, *alias* WONG MAT.

MOTION IN ARREST OF JUDGMENT.

And now, after verdict against the said defendant and before sentence, comes the said defendant in his proper person and by M. H. Hernan and Frank J. Hennessy, his attorneys, and moves the Court here to arrest judgment and not pronounce sentence for the following reasons:

1. That the first count in the indictment filed herein does not state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

2. That the second count in the indictment filed herein does not state facts sufficient to constitute a public offense under the laws of the United States against the defendant.

WONG LUNG SING,
Defendant.
By FRANK J. HENNESSY,
M. H. HERNAN,
Attorneys for Defendant. [42]

Said motion in arrest of judgment was duly argued in behalf of the defendant and was thereupon submitted to the Court for its decision, and, after due consideration the Court denied the motion in arrest of judgment, to which ruling the attorneys for defendant then and there duly and regularly excepted.

Thereupon the said Court, as punishment for said offense, imposed upon said defendant imprisonment at McNeil's Island for a period of three years on each count of the indictment, said sentences to run concurrently, and in addition that the defendant pay a fine of $1,000.00.

The above bill of exceptions contains all of the evidence, oral and documentary, and all of the proceedings relating to the trial, judgment and conviction and sentence, motions for a new trial and motions in arrest of judgment of the defendant.

It is hereby stipulated and agreed by and between the attorneys for the United States and for the defendants, and each of them, that all exhibits introduced in evidence and for identification upon the trial of the above-entitled cause and now in the custody of the Clerk of the Court shall be deemed to be included as a part of the foregoing bill of exceptions with the same effect in all respects as if incorporated in said bill of exceptions. In the event the said exhibits are not so numbered as to identify the same, they shall be marked by the Court upon its certification of this bill of exceptions so as to identify the same.

Dated at San Francisco, California, this —— day of ——, 1924.

FRANK J. HENNESSY,
M. H. HERNAN,
Attorneys for Defendant Wong Lung Sing. [43]

It is hereby stipulated and agreed by and between the attorneys for the United States and the attorneys for the defendant that the proposed bill of exceptions of said defendant and the proposed amendments thereto of the United States, have been correctly engrossed and have been presented in time, and as engrossed may be approved, allowed and settled by the Judge of the above-entitled court as correct in all respects, and that the same shall be made a part of the record in said case and is hereby made the bill of exceptions therein and shall be, and is, the bill of exceptions upon the writ of error sued out for the above-named defendant Wong Lung Sing.

Dated, San Francisco, California, July 10, 1924.

FRANK J. HENNESSY,
M. H. HERNAN,
Attorneys for Defendant Wong Lung Sing.
JOHN T. WILLIAMS,
S.
United States District Attorney.

The foregoing bill of exceptions, duly proposed and agreed upon by the counsel for the respective parties, is correct in all respects, and is hereby approved, allowed and settled and made a part of the record herein as per the stipulation of the attorneys for the respective parties.

Dated, San Francisco, California, Aug. 15th, 1924.

JOHN S. PARTRIDGE,
United States District Judge. [44]

[Endorsed]: Filed Aug. 15, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [45]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Friday, the 8th day of February, in the year of our Lord one thousand nine hundred and twenty-four. Present: The Honorable CHARLES F. LYNCH, District Judge for the District of New Jersey, designated to hold and holding this court.

No. 14,459.

UNITED STATES OF AMERICA

vs.

WONG LUNG SING et al.

MINUTES OF COURT—FEBRUARY 8, 1924—VERDICT.

This case came on regularly this day for further trial of defendant, Wong Lung Sing, upon indictment filed herein. Said defendant was present in court with his attorney. T. J. Riordan, Esq., Asst. U. S. Atty., was present for and on behalf of United States. The jury heretofore impaneled and sworn

to try the issues herein was present and complete. The jury, through their foreman, presented a sealed verdict, which was opened and which said verdict is in the words and figures following:

"We, the Jury, find Wong Lung Sing, the defendant at the bar, guilty as charged.

"GEORGE W. ACTON,
"Foreman."

After hearing Mr. Riordan and Mr. Hennessy, ordered case continued to Feb. 9, 1924, for pronouncing of judgment.

Upon motion of Mr. Riordan, ordered bond of defendant raised to $10,000 and that, in default of bond, defendant stand committed to custody of U. S. Marshal and that a *mittimus* issue.

Ordered that the exhibits introduced and filed herein be returned to the U. S. Attorney, and same were accordingly delivered in open court. [46]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 14,459.

THE UNITED STATES OF AMERICA
vs.
WONG LUNG SING.

(VERDICT.)

We, the jury, find Wong Lung Sing, the defendant at the bar, guilty as charged.

GEORGE W. ACTON,
Foreman.

[Endorsed]: Filed February 8, 1924, at 10 o'clock and 05 minutes A. M. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [47]

In the District Court of the United States, in and for the Southern Division of the Northern District of California.

No. 14,459.

UNITED STATES OF AMERICA

vs.

WONG LUNG SING, *alias* WONG MAT.

MOTION FOR A NEW TRIAL.

Now comes Wong Lung Sing, the defendant in the above-entitled cause and by M. H. Hernan and Frank J. Hennessy, his attorneys, moves the above-entitled court to set aside the verdict rendered herein and to grant a new trial of said cause, and for reasons therefor, shows to the court the following:

1. That the verdict in said cause is contrary to the law of the case.

2. That the verdict in said cause is not supported by any evidence in the case.

3. That the Court upon the trial of said cause admitted incompetent evidence offered by the United States of America.

4. That the Court improperly instructed the jury to defendant's prejudice.

WONG LUNG SING,
Defendant.

By M. H. HERNAN,
FRANK J. HENNESSY,
Attorneys for Defendant.

Due service and receipt of a copy of the within motion for new trial is hereby admitted this 9th day of February, 1924.

JOHN T. WILLIAMS,
United States Attorney.
By THOS. J. RIORDAN. [48]

[Endorsed: Filed Feb. 9, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [49]

In the District Court of the United States in and for the Southern Division of the Northern District of California.

No. 14,459.

UNITED STATES OF AMERICA
vs.
WONG LUNG SING, *alias* WONG MAT.

MOTION IN ARREST OF JUDGMENT.

And now after verdict against the said defendant and before sentence, comes the said defendant in his proper person and by M. H. Hernan and Frank J. Hennessy, his attorneys, and moves the Court here to arrest judgment and not pronounce sentence for the following reasons:

1. That the first count in the indictment filed herein does not state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

2. That the second count in the indictment filed herein does not state facts sufficient to constitute a public offense under the laws of the United States against this defendant.

WONG LUNG SING,
Defendant.

By M. H. HERNAN,
FRANK J. HENNESSY,
Attorneys for Defendant.

Due service and receipt of a copy of the within motion in arrest of judgment is hereby admitted this 9th day of February, 1924.

JOHN T. WILLIAMS,
By THOS. J. RIORDAN
Asst. [50]

[Endorsed]: Filed Feb. 9, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [51]

At a stated term of the District Court of the United States of America for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, on Saturday, the 9th day of February, in the year of our Lord one thousand nine hundred and twenty-four. Present: the Honorable CHARLES F. LYNCH, District Judge for the District of New Jersey, designated to hold and holding this court.

No. 14,459.

UNITED STATES OF AMERICA

vs.

WONG LUNG SING et al.

MINUTES OF COURT—FEBRUARY 9, 1924—JUDGMENT.

This case came on regularly this day for pronouncing of judgment upon defendant Wong Lung Sing, who was present with his attorney, F. J. Hennessy, Esq., T. J. Riordan, Esq., Asst. U. S. Atty., was present for and on behalf of the United States.

Mr. Hennessy filed a motion for new trial and motion in arrest of judgment, which motions, after argument by counsel, were ordered denied.

No further cause being shown why judgment should not now be pronounced, after hearing defendant and attorneys, the Court ordered that de-

fendant Wong Lung Sing, for offense of which he stands convicted, be imprisoned for period of 3 years as to each of the two counts in the indictment filed herein, said terms of imprisonment to run concurrently, and that he pay a fine in the sum of $1,000.00; said term of imprisonment to be executed upon said defendant Wong Lung Sing by imprisonment in the United States Penitentiary at McNeill Island, State of Washington. Ordered that said defendant stand committed to custody of U. S. Marshal for this district to execute said judgment, and that a commitment issue. [52]

Upon motion of Mr. Hennessy, it is ordered that defendant be released from custody, pending final disposition of writ of error, upon bond in the sum of $10,000.00 and cost bond in the sum of $250.00. [53]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 14,459.

THE UNITED STATES OF AMERICA

vs.

WONG LUNG SING, *alias* AH MAT.

JUDGMENT ON VERDICT OF GUILTY.

Viol. Act Feb. 9, 1909, as Am. Jan. 17, 1914, and May 26, 1922. Opium Act.

T. J. Riordan, Esq., Assistant United States

Attorney, and the defendant with his counsel came into court. The defendant was duly informed by the Court of the nature of the indictment filed on the 8th day of January, 1924, charging him with the crime of Act Feb. 9, 1909, as am. (Jones-Miller Act) and Act Dec. 17, 1914, as am. (Harrison Narcotic Act); of his arraignment and plea of not guilty; of his trial and the verdict of the jury on the 9th day of February, 1924, to wit: "We, the Jury, find Wong Lung Sing, the defendant at the bar, Guilty, as charged. George W. Acton, Foreman."

The defendant was then asked if he had any legal cause to show why judgment should not be entered herein and no sufficient cause being shown or appearing to the Court, and the Court having denied a motion for new trial and a motion in arrest of judgment; thereupon the Court rendered its judgment;

THAT, WHEREAS, the said Wong Lung Sing having been duly convicted in this court of the crime of Act Feb. 9, 1909, as am. (Miller-Jones Act) and Act Dec. 17, 1914, as am. (Harrison Narcotic Act);

IT IS THEREFORE ORDERED AND ADJUDGED that the said Wong Lung Sing, be imprisoned for period of three (3) years in the United States Penitentiary at McNeill Island, Washington, [54] as to each of the two counts of the indictment. Said judgments of imprisonment to run concurrently and that he pay a fine of One Thousand ($1,000.00) Dollars.

Judgment entered this 9th day of February, A. D. 1924.

WALTER B. MALING,
Clerk.
By C. W. Calbreath,
Deputy Clerk.

Entered in Vol. 15 Judg. and Decrees, at page 314. [55]

In the District Court of the United States in and for the Southern Division of the Northern District of California.

(No. 14,459.)

UNITED STATES OF AMERICA

vs.

WONG LUNG SING *alias* WONG MAT.

PETITION FOR WRIT OF ERROR AND SUPERSEDEAS.

Now comes Wong Lung Sing, defendant herein, by M. H. Hernan and Frank J. Hennessy, his attorneys, and say that on the 9th day of February, 1924, this Court rendered judgment herein against the defendant, in which judgment and the proceedings had prior thereto in this cause, certain errors were committed to the prejudice of the defendant, all of which will more fully appear from the assignment of errors which is filed with this petition:

WHEREFORE, the defendant prays that a writ of error may issue in his behalf out of the

United States Circuit Court of Appeals for the Ninth Circuit, for the correction of the errors complained of, and that a transcript of the record in this cause, duly authenticated may be sent to the Circuit Court of Appeals aforesaid, and that this defendant be awarded a *supersedeas* upon said judgment and all necessary and proper processes including bail.

WONG LUNG SING,
Defendant.
By M. H. HERNAN,
FRANK J. HENNESSY,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 9, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [56]

In the District Court of the United States in and for the Southern Division of the Northern District of California, First Division.

(No. 14,459.)

UNITED STATES OF AMERICA
vs.
WONG LUNG SING, *alias* WONG MAT.

ASSIGNMENT OF ERRORS.

Wong Lung Sing, the plaintiff in error in the above-entitled cause and M. H. Hernan and Frank J. Hennessy, his attorneys, in connection with their petition for a writ of error, make the following

assignment of errors, which they allege occurred upon the trial of said cause:

1. The Court erred in admitting in evidence over the objection of the defendant a certain suitcase and its contents, being 54 five tael cans of smoking opium. Said objection was that said suitcase and its contents had been seized as the result of an unlawful search and that said evidence was immaterial, irrelevant and incompetent as to the defendant, to which ruling the defendant excepted.

2. The Court erred in denying the motion of defendant for a directed verdict of "not guilty" at the close of the evidence in said case, upon the first count of said indictment upon the ground that there was no evidence that the defendant had received or transported or facilitated the transportation of opium, knowing the same to have been unlawfully imported into the United States; to which ruling the defendant excepted.

3. The Court erred in denying the motion of defendant for a directed verdict of "not guilty" upon the second county of the indictment, made at the close of the evidence, upon the ground [57] that there was not evidence that the defendant had purchased, or sold or distributed any opium, not in nor from the original stamped packages; to which ruling the defendant excepted.

4. The Court erred in denying the motion of defendant for a new trial on the ground that the verdict is not supported by the evidence in the case; to which ruling the defendant excepted.

5. The Court erred in denying the motion of defendant in arrest of judgment upon the ground that the first count of said indictment does not state facts sufficient to constitute a public offense under the laws of the United States; to which ruling the defendant excepted.

6. The Court erred in denying the motion of defendant in arrest of judgment upon the ground that the second count of said judgment does not state facts sufficient to constitute a public offense under the laws of the United States; to which ruling the defendant excepted.

7. The Court erred in overruling the objection made by defendant to the question propounded by the United States Attorney to the Government witness, Elasho: "Q. Did you hear any other conversation relative to the contents of the suitcase?" The objection being that the question was leading and had already been asked and answered. To this ruling the defendant excepted.

WONG LUNG SING,
Defendant.

By M. H. HERNAN,
FRANK HENNESSY,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 9, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [58]

In the District Court of the United States in and for the Southern Division of the Northern District of California (First Division).

(No. 14,459.)

UNITED STATES OF AMERICA

vs.

WONG LUNG SING, *alias* WONG MAT.

ORDER ALLOWING WRIT OF ERROR AND SUPERSEDEAS.

The writ of error and the supersedeas herein prayed for by Wong Lung Sing, *alias* Wong Mat, the above-named plaintiff in error, pending the decision upon said writ of error, are hereby allowed and the defendant is admitted to bail upon the writ of error in the sum of $10,000.

The bond for costs of the writ of error is hereby fixed at the sum of $250.00 for the defendant.

Dated at San Francisco, California, this 9th day of February, 1924.

CHARLES F. LYNCH,
United States District Judge.

[Endorsed]: Filed Feb. 9, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [59]

In the District Court of the United States in and for the Southern Division of the Northern District of California.

(No. 14,459.)

UNITED STATES OF AMERICA

vs.

WONG LUNG SING, *alias* WONG MATT.

STIPULATION AND ORDER EXTENDING DEFENDANT'S TIME TO SERVE, PREPARE AND FILE PROPOSED BILL OF EXCEPTIONS ON WRIT OF ERROR.

It is hereby stipulated that the above-named defendant have thirty days from the date hereof within which to prepare, serve and file his proposed bill of exceptions on writ of error to the United States Circuit Court of Appeals in the above-entitled proceeding.

Dated this 19th day of February, 1924.

JOHN T. WILLIAMS,
United States District Attorney.
By THOS. J. RIORDAN,
Asst.
FRANK J. HENNESSY and
M. H. HERNAN,
Attorneys for Defendant.

So ordered.

Dated this 19th day of February, 1924.

CHARLES F. LYNCH,
United States District Judge.

[Endorsed]: Filed Feb. 19, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [60]

In the District Court of the United States in and for the Southern Division of the Northern District of California.

(No. 14,459.)

UNITED STATES OF AMERICA

vs.

WONG LUNG SING, *alias* WONG MAT.

STIPULATION AND ORDER EXTENDING DEFENDANT'S TIME TO SERVE AND FILE PROPOSED BILL OF EXCEPTIONS ON WRIT OF ERROR.

It is stipulated that the above-named defendant have thirty days from the date hereof within which to serve and file his proposed bill of exceptions on writ of error to the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled proceeding.

Dated this 19th day of March, 1924.

JOHN T. WILLIAMS,
United States District Attorney.
M. H. HERNAN and
FRANK J. HENNESSY,
Attorneys for Defendant.

So ordered.

Dated this 19th day of March, 1924.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Oct. 17, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [61]

In the District Court of the United States in and for the Southern Division of the Northern District of California.

(No. 14,459.)

UNITED STATES OF AMERICA

vs.

WONG LUNG SING, *alias* WONG MAT.

STIPULATION AND ORDER EXTENDING DEFENDANT'S TIME TO SERVE AND FILE PROPOSED BILL OF EXCEPTIONS ON WRIT OF ERROR.

It is stipulated that the above-named defendant have thirty days from the date hereof within which to serve and file his proposed bill of exceptions on writ of error in the United States Circuit Court of Appeals for the Ninth Circuit in the above-entitled proceeding.

Dated this 18 day of April, 1924.

JOHN T. WILLIAMS,
United States District Attorney.
FRANK J. HENNESSY,
Attorneys for Defendant.

So ordered.

Dated this 18th day of April, 1924.

FRANK H. KERRIGAN,
United States District Judge.

[Endorsed]: Filed Apr. 18, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [62]

14,459.

(BOND TO APPEAR ON WRIT OF ERROR.)

UNITED STATES OF AMERICA.

Northern District of California,—ss.

KNOW ALL MEN BY THESE PRESENTS, That we, Wong Lung Sing, *alias* Wong Mat, *alias* Ah Mat, as principal, and National Surety Company and ———, as sureties, are held and firmly bound unto the *the* United States of America, in the sum of Ten Thousand ($10,000) Dollars, to be paid to the said United States of America, for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators, jointly and severally by these presents.

SEALED with our seals and dated the 26th day of April, in the year of our Lord one thousand nine hundred and twenty-four:

THE CONDITION of the above recognizance is such that, whereas, an indictment has been found by the United States Grand Jury for the Southern Division of the Northern District of California,

and filed on the 8th day of January, A. D. 1924, in the Southern Division of the United States District Court for the Northern District of California, charging the said Wong Lung Sing, *alias* Wong Mat, *alias* Mat with Violation Act December 17, 1914, as amended (Harrison Narcotic Act) and Violation Act February 9, 1909, as amended (Opium Act), committed on or about the 18th day of November, A. D. 1923, to wit, at the District and Division aforesaid, thereafter judgment and sentence was rendered, filed and imposed and writ of error allowed.

AND WHEREAS, the said Wong Lung Sing, *alias,* Wong Mat, *alias* Ah Mat, has been required to give a recognizance, with sureties, in the sum of Ten Thousand ($10,000) Dollars for [63] his appearance before said United States District Court whenever required, pending determination of writ of error.

NOW, THEREFORE, if the said Wong Lung Sing, *alias* Wong Mat, *alias* Ah Mat, shall personally appear at the U. S. Circuit Court of Appeals, Ninth Circuit, Southern Division of the United States District Court for the Northern District of California, First Division, to be holden at the courtrooms of said courts, in the city and county of San Francisco, *on the* when required *A. D. 192—,* at ten o'clock in the forenoon of that day, and afterwards whenever or wherever he may be required to answer the said indictment and all matters and things that may be objected against him whenever the same may be prosecuted, and render himself

amenable to any and all lawful orders and process in the premises, and not depart the said Court without leave first obtained, and if he shall appear for judgment and render himself in execution thereof, then this recognizance shall be void, otherwise, to remain in full effect and virtue.

(Chinese Signature) (WONG LUNG SING.) [Seal]

Address: 918 Grant Ave., S. F.

NATIONAL SURETY COMPANY. [Seal]

By C. T. HUGHES, [Seal]

Its Attorney-in-fact.

Acknowledged before me and approved the day and year first above written.

[Seal] THOMAS E. HAYDEN,

United States Commissioner, for the Northern District of California, San Francisco.

Name and Address of Attorney for Defendant:

M. H. HERNAN, Address:
Grant Bldg., S. F.
Hearst Bldg., S. F.

C. M. HUGHES,
Insurance,
433 California Street, San Francisco. [64]

[Endorsed]: Filed Apr. 28, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [65]

No. 14,459.

(COST BOND ON WRIT OF ERROR.)

KNOW ALL MEN BY THESE PRESENTS, That we, Wong Lung Sing, *alias* Wong Mat, *alias* Ah Mat, and National Surety Company, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Two Hundred Fifty ($250) Dollars, to be paid to the said United States of America certain attorney, executors, administrators or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

SEALED with our seals and dated this 9th day of February, in the year of our Lord one thousand nine hundred and twenty-four.

WHEREAS, lately at a District Court of the United States for the Southern Division, Northern District of California, First Division, in a suit pending in said court, between United States of America vs. Wong Lung Sing, *alias* Wong Mat, *alias* Ah Mat, a judgment and sentence was rendered against the said Wong Lung Sing, *alias* Wong Mat, *alias* Ah Mat, and the said Wong Lung Sing, *alias* Wong Mat, *alias* Ah Mat, having obtained from said Court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said United States of America citing and admonishing it to be and appear at a United States Circuit Court of Ap-

peals for the Ninth Circuit, to be holden at San Francisco, in the State of California.

NOW, THE CONDITION OF THE ABOVE OBLIGATION IS SUCH, That if the said Wong Lung Sing, *alias* Wong Mat, *alias* Ah Mat, shall prosecute his writ of error to effect, and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue. [66]

(Chinese signature) WONG LUNG SING. [Seal]

NATIONAL SURETY COMPANY. [Seal]

By C. T. HUGHES, [Seal]

Its Attorney-in-fact.

Acknowledged before me the day and year first above written.

[Seal] THOMAS E. HAYDEN.

[Endorsed]: Filed Feb. 11, 1924. Walter B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [67]

In the Southern Division of the United States District Court in and for the Northern District of California, First Division.

No. 14,459.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

WONG LUNG SING, *alias* WONG MAT, *alias* AH MAT,

Defendant.

(NOTICE OF ASSOCIATION OF ATTORNEY.)

To the Clerk of the Above-entitled Court, and to STERLING CARR, Esq., United States Attorney for the Northern District of California.

YOU ARE HEREBY NOTIFIED that I have on the 11th day of October, 1924, employed and associated R. B. McMillan, 744–745 Phelan Building, San Francisco, California, with M. H. Hernan, Esq., as my attorneys and counselors at law to represent me in all further proceedings in the above-entitled case.

Dated, October 11th, 1924.

WONG LUNG SING (Chinese Signature).

I hereby consent to the foregoing employmenut and association.

Dated, October 11th, 1924.

M. H. HERNAN.

I hereby accept the foregoing employment and association.

Dated October 11, 1924.

R. B. McMILLAN.

[Endorsed]: Filed Oct. 14, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [68]

CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT ON WRIT OF ERROR.

I, Walter B. Maling, Clerk of the United States District Court, for the Northern District of Cali-

fornia, do hereby certify that the foregoing 68 pages, numbered from 1 to 68, inclusive, contain a full, true and correct transcript of certain records and proceedings, in the case of The United States of America vs. Wong Lung Sing et al., No. 14,459, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on writ of error (copy of which is embodied herein), and the instructions of the attorneys for defendant and plaintiff in error herein.

I further certify that the cost for preparing and certifying the foregoing transcript on writ of error is the sum of twenty-five dollars and sixty cents ($25.60) and that the same has been paid to me by the attorney for the plaintiff in error herein.

Annexed hereto are the original writ of error, return to writ of error and original citation on writ on error.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 24th day of October, A. D. 1924.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [69]

WRIT OF ERROR.

UNITED STATES OF AMERICA,—ss.

The President of the United States of America, to the Honorable, the Judges of the District Court of the United States for the Northern District of California, GREETING:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between United States of America, defendant in error, a manifest error hath happened, to the great damage of the said Wong Lung Sing, *alias* Wong Mat, plaintiff in error, as by his complaint appears:

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, within thirty days from the date hereof, in the said Circuit Court of Appeals, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS the Honorable WILLIAM HOWARD TAFT, Chief Justice of the United States, the 9th day of February, in the year of our Lord one thousand nine hundred and twenty-four.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk.

Allowed by:

CHARLES F. LYNCH,
U. S. District Judge.

[Endorsed]: No. 14,459. United States District Court for the Northern District of California. Wong Lung Sing, *alias* Wong Mat, Plaintiff in Error, vs. United States of America, Defendant in Error. Writ of Error. Filed Feb. 9, 1924. Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [70]

RETURN TO WRIT OF ERROR.

The answer of the Judges of the United States District Court, for the Northern District of California, to the within writ of error:

As within we are commanded, we certify under the seal of our said District Court, in a certain schedule to this writ annexed, the record and all proceedings of the plaint whereof mention is made, with all things touching the same, to the United States Circuit Court of Appeals for the Ninth Cir-

cuit, within mentioned, at the day and place within contained.

We further certify that a copy of this writ was on the 9th day of February, A. D. 1924, duly lodged in the case in this court for the within named defendant in error.

By the Court:

[Seal] WALTER B. MALING,

Clerk U. S. District Court, Northern District of California.

By C. M. Taylor,
Deputy Clerk. [71]

In the District Court of the United States in and for the Southern Division of the Northern District of California (First Division).

WONG LUNG SING, *alias* WONG MAT,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

CITATION ON WRIT OF ERROR.

United States of America,—ss.

The President of the United States to the United States of America, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within thirty

days from the date hereof, pursuant to a writ of error duly issued and now on file in the clerk's office, in the United States District Court in and for the Southern Division of the Northern District of California, wherein Wong Lung Sing *alias* Wong Mat is the plaintiff in error and you are the defendant in error, to show cause, if any there be, why the judgment rendered against the plaintiff in error, as in said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable CHARLES F. LYNCH, District Judge of the United States District Court, in and for the Southern Division of the Northern District of California, this 9th day of February, 1924.

CHARLES F. LYNCH,
United States District Judge. [72]

Due service and receipt of a copy of the within citation is hereby admitted this 9th day of February, 1924.

JOHN T. WILLIAMS
By THOS. J. RIORDAN,
United States Attorney.

[Endorsed]: No. 14,459. District Court of the United States, Southern Division of the Northern District of California (First Division). Wong Lung Sing, *alias* Wong Mat, Plaintiff in Error, vs. United States of America, Defendant in Error. Citation on Writ of Error. Filed Feb. 9, 1924.

Walter B. Maling, Clerk. By C. M. Taylor, Deputy Clerk.

[Endorsed]: No. 4363. United States Circuit Court of Appeals for the Ninth Circuit. Wong Lung Sing, *alias* Wong Mat, Plaintiff in Error, vs. United States of America, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, First Division.

Received October 24, 1924.

F. D. MONCKTON,
Clerk.

Filed November 3, 1924.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 4363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WONG LUNG SING, alias WONG MAT,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

M. H. HERNAN,
R. B. McMILLAN,
Attorneys for Plaintiff in Error.

No. 4363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WONG LUNG SING, alias WONG MAT,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

I.

STATEMENT OF THE CASE.

The plaintiff in error, Wong Lung Sing and his co-defendant Charley Wong You, were jointly indicted in the Southern Division of the District Court of the United States, Northern District of California, the indictment containing two counts.

The *first count* alleges that the accused violated

> "a requirement of the Act of February 9, 1909, as amended January 17, 1914, and as amended May 26, 1922, in that they, the said defendants did then and there wilfully, unlawfully, knowingly, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain opium, to wit: fifty-five cans of prepared smoking opium containing 324 ounces,

> 15 grains, and one bindle of yen shee containing 10 grains, which said prepared smoking opium and yen shee as the said defendants then and there well knew, had been imported into the United States contrary to law."

The *second count* alleges that the accused violated

> "a requirement of the Act of December 17, 1914, as amended February 24, 1919, in that he, the said defendant, did then and there knowingly, willfully, unlawfully and feloniously purchase, sell, dispose and distribute a certain quantity of opium, to wit, fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and a certain derivative of opium, to wit, one bindle of yen shee containing 10 grains, which said smoking opium and yen shee was not then and there in nor from the original stamped packages."

The prosecution against the co-defendant Charley Wong You was discontinued, he having become insane after arrest. (This appears but dimly in the Transcript. Trans. Rec. 6.) At the conclusion of the evidence of the trial of plaintiff in error, his counsel made a motion for a directed verdict. (Trans. Rec. 29.) The motion was renewed at the end of the case (Trans. Rec. 40) and denied, the defendant duly reserving an exception. The jury returned a verdict of guilty as charged on each count. The Court sentenced the defendant to be imprisoned "for a period of three years in the United States Penitentiary at McNeill Island, Washington, as to each of the two counts of the indictment. Said judgments of imprisonment to

run concurrently and that he pay a fine of $1,000." (Trans. Rec. 63.) In due time the defendant, Wong Lung Sing, sued out a Writ of Error and on the Writ presented his case upon the Record, including a Bill of Exceptions containing all the evidence. (Trans. Rec. 54.) It is the contention of the plaintiff in error: (1) That the indictment does not state facts sufficient to constitute *prima facie* a crime or public offense; (2) That the evidence is insufficient to justify or sustain the verdict and judgment; (3) Error in overruling the objection to the admission in evidence of a dress suitcase containing 55 cans of opium.

II.

SPECIFICATIONS OF ERROR.

The plaintiff in error specifies the following errors in support of his prayer for the reversal of judgment, viz.:

1. The Court erred in admitting in evidence over the objection of the defendant a certain suitcase and its contents, being 54 five tael cans of smoking opium. Said objection was that said suitcase and its contents had been seized as the result of an unlawful search and that said evidence was immaterial, irrelevant and incompetent as to the defendant, to which ruling the defendant excepted.

2. The Court erred in denying the motion of defendant for a directed verdict of "not guilty"

at the close of the evidence in said case, upon the first count of said indictment upon the ground that there was no evidence that the defendant had received or transported or facilitated the transportation of opium, knowing the same to have been unlawfully imported into the United States; to which ruling the defendant excepted.

3. The Court erred in denying the motion of defendant for a directed verdict of "not guilty" upon the second count of the indictment, made at the close of the evidence, upon the ground that there was not evidence that the defendant had purchased, or sold or distributed any opium, not in nor from the original stamped packages; to which ruling the defendant excepted.

4. The Court erred in denying the motion of defendant in arrest of judgment upon the ground that the first count of said indictment does not state facts sufficient to constitute a public offense under the laws of the United States; to which ruling the defendant excepted.

5. The Court erred in denying the motion of defendant in arrest of judgment upon the ground that the second count of said judgment does not state facts sufficient to constitute a public offense under the laws of the United States; to which ruling the defendant excepted.

III.

BRIEF OF ARGUMENT.

1. The Indictment Charges No Crime.

We contend that neither the first or second count of the indictment charges a crime or public offense in violation of any law or statute of the United States. The *first count* attempts to charge that the acts therein alleged, constitute a violation of the Act of February 9, 1909, as amended (42 Stat. 596). No *facts* are alleged in the first count showing that the opium was *imported* into the United States, contrary to law. There is not even an averment that the importation was made contrary to law nor that the opium had been imported. True it is alleged that the defendants *knew* that it had been imported "contrary to law," but this does not conform to the fundamental requirements of criminal pleading that the essential fact of importation be directly and not inferentially nor argumentatively alleged and that *facts* showing an importation contrary to law and not the legal conclusion itself, be pleaded.

The allegation that the defendants *knew* that the opium had been imported contrary to law, is neither an averment of importation, nor an averment of facts, showing an importation contrary to law. Alleging even an importation contrary to law, would be merely the conclusion of the pleader, a mere conclusion of law, and as such involving an essential element of the offense as defined by the statute, but

not as averred as to be susceptible of trial and determination by jury, *the facts not being alleged.*

It is true that the inference argumentatively arises that if as alleged the defendants *knew* that the opium had been imported contrary to law, it must have been so imported, or else they could not know it; but this is pleading by inference and argument instead of complying with the elementary rule of criminal pleading that the *facts* showing an importation contrary to law be pleaded by positive and direct averment and not inferentially.

United States v. Hess, 124 U. S. 486;
Pettibone v. United States, 148 U. S. 202.

In the next place the averment that the defendants *knew* that the opium was imported into the United States "contrary to law," if construed as an averment of importation "contrary to law," is a mere *conclusion of law* on the part of the pleader and not an averment of fact. It does not give the accused the requisite information of the nature and cause of the accusation, guaranteed him by the Sixth Amendment of the Constitution of the United States, as to the essential element of an importation contrary to law, for it does not inform him of the *facts* constituting such importation, as the basis of the charge.

It is stated by the Supreme Court of the United States in holding that an allegation in an indictment that contraband goods were imported "con-

trary to law" is fatally defective; that the *facts* must be averred showing that such is the character of the importation.

Said Mr. Justice White, in the case of *Keck v. U. S.,* 172 U. S. 434, 437:

> "The allegations of the count were obviously too general, and did not sufficiently inform the defendant of the nature of the accusation against him. The words, 'contrary to law,' contained in the statute, clearly relate to legal provisions not found in Section 3082 itself; but we look in vain in the count for any indication of what was relied on as violative of the statutory regulations concerning the importation of merchandise. The generic expression, 'import and bring into the United States,' did not convey the necessary information, because importing merchandise is not per se contrary to law, and could only become so when done in violation of specific statutory requirements. As said in the *Hess* case, at page 486, 124 U. S., and page 573, 8 Sup. Ct.:
>
> 'The statute upon which the indictment is founded only describes the general nature of the offense prohibited, and the indictment, in repeating its language without averments disclosing the particulars of the alleged offense, states no matters upon which issue could be formed for submission to a jury.' "
>
> *Keck v. United States,* 172 U. S. 434, 437; 19 Sup. Ct. Rep. 254, 255.

It is elementary in criminal pleading that an allegation of what is but a *conclusion of law* on the part of the pleader, respecting an essential element

of the offense attempted to be charged is fatal to the accusation.

Johnson v. United States, 294 Fed. 753 (9th Circuit);
United States v. Mills, 7 Pet. 142;
United States v. Cook, 17 Wall. 174;
United States v. Cruikshank, 92 U. S. 558, 559.

And on the specific point that an allegation that an importation or other thing has been done "contrary to law," is fatal to the indictment, we cite:

United States v. Kee Ho, 33 Fed. 333, 334, 335, 336;
United States v. Thomas, 4 Ben. 370;
United States v. Chaplin, 13 Blatchf. 186.
United States v. Fraser, 42 Fed. 140;
State v. Parkersburg Brewing Co., 53 W. Va. 596.

We maintain that it is no answer to the point we make against the first count of the indictment that the statute provides that,

> "(f) Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury."

Manifestly this provision of the statute applies only to the *evidence in the case,* and not to the indictment. And we contend it is so held in:

Johnson v. United States, 294 Fed. 753 (9th Circuit).

For the reasons we have stated and on the authorities we have cited, it is submitted that the first count of the indictment charges no violation of the statute, and that therefore the District Court erred in denying the motion of defendant in arrest of judgment and in passing judgment upon him on the first count.

IV.

THE SECOND COUNT OF THE INDICTMENT CHARGES NO CRIME.

In the second count of the indictment it is charged that the *defendants* violated

> "a requirement of the Act of December 17, 1914, as amended February 24, 1919, *in that he, the said defendant,* did then and there knowingly, wilfully, unlawfully and feloniously purchase, sell, dispose and distribute a certain quantity of opium, to-wit, fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and a certain derivative of opium, to-wit, one bindle of yen shee containing 10 grains, which said smoking opium and yen shee was not then and there in nor from the original stamped packages."

Now, in the first place, this count is *void* on its face for incurable uncertainty. It charges that "he

the said defendant", did the things alleged; but there are *two defendants* named in the second count, and it is not alleged *which one* of the defendants is the person who did the things charged. It does not appear but that it was the co-defendant of plaintiff in error who committed the acts alleged, and not the plaintiff in error. It results that the second count charges no offense against the plaintiff in error.

In the next place, the *second count* charges no offense, in that the statute makes it unlawful for any of the persons it designates

> "to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package",

but the plaintiff in error is not charged in the indictment to be one of the persons, to-wit: *A person required to register under the provisions of the Harrison Narcotic Act* (42 Stat. 298).

This defect in the indictment is fatal to the second count.

Jin Fuey Moy, 241 U. S. 394.

Mr. Circuit Judge Hunt, speaking for the Court, said in *Lewis v. United States,* 195 Federal Reporter 678, 679 (9th Circuit):

> "In United States v. Jin Fuey Moy, 241 U. S. 394, 36 Sup. Ct. 658, 60 L. Ed. 1061, Ann. Cas. 1917D, 854, the Supreme Court held that any person not registered under section 8 of the act heretofore referred to cannot be taken to mean

> any person in the United States, 'but must be taken to refer to the class with which the statute undertakes to deal—the persons who are required to register by section 1'. It must therefore follow that, unless the defendant is one of the class required to register by section 1, such possession or control of narcotics is not made presumptive evidence of a violation of section 8 and of section 1.
>
> By section 1 the persons (with certain exceptions) required to register are those who produce, import, manufacture, compound, deal in, dispense, sell, distribute, or give away opium or coca leaves, or any derivatives or preparation thereof. The evidence fails to show that this defendant dealt in or distributed the drugs. There is no evidence that he was in the business of selling narcotics, or that he handed any drug to Morris, or attempted to do so. No one heard him negotiating or bargaining in respect to any drug, and it is not contended by the prosecution that the defendant received any money from Morris. He may have been addicted to the use of opium, and may have had possession of a quantity of the drugs; but, unless he was one of the class required to register, mere possession would not subject him to the penalties provided for violating section 1 of the statute. United States v. Jin Fuey Moy, supra; Johnson v. United States, 294 Fed. 753, decided January 21, 1924."

It is true that the statute makes it unlawful for

> "*any person* to purchase, sell, dispense or distribute any of the aforesaid drugs except in the original stamped package or from the original stamped package",

but as held by the Courts in the cases above cited in reference to the meaning of the statute as to

the words "any person", it does not mean any person in the United States, but only such persons as are required to register under section one of the Harrison Narcotic Act.

United States v. Jin Fuey Moy (above cited);
Lewis v. United States (above cited);
Johnson v. United States (above cited);
Swartz v. United States, 280 Fed. 115 (5th Circuit).

Whilst it was thus held in respect to another provision in the statute where the broad and very general language, "any person", is used; still it is an elementary rule of statutory construction that the same meaning must be given the same words and terms in the same statute.

Rhodes v. Weldy, 46 Ohio St. 242.

And there is another elementary rule of statutory construction requiring that the same meaning be given the words "any person", wherever they appear in the same statute, and especially in the same section of the statute. We refer to the rule of *noscitur a sociis.*

In the third place, the second count in the indictment is fatally defective in that it does not allege that the opium and yen shee were not *purchased, sold, dispensed in nor from the original stamped packages.*

Whilst the indictment alleges that the opium was not *then and there* in nor from the original stamped packages, yet this does not exclude the conclusion

that it was at one time previously in the original stamped packages, and if it was, it would not be a violation of the statute *in this particular* to thereafter purchase, sell, dispense or distribute it or any part of it without the need of first putting it back in the original stamped packages from which it had been at one time taken.

For the reasons we have given it is respectfully submitted that the *second count* is fatally defective and charges no crime. It therefore follows that the District Court erred in refusing to grant the motion in arrest of judgment respecting the second count and in passing judgment on that count.

V.

NO EVIDENCE OF GUILT ON EITHER COUNT OF THE INDICTMENT.

There is no substantial evidence tending to show that the plaintiff in error is guilty on the *first count* of the indictment. There certainly is no evidence that he either received or concealed, bought or sold, or did anything to facilitate the transportation or concealment after importation of the opium or yen shee, nor that he had any knowledge that it had been imported into the United States contrary to law.

Respecting the first count the evidence, in part, is as follows: Phil H. Oyer, a witness for the Government, testified that he is a deputy sheriff of

Monterey County, California; that he knew the defendant Wong Lung Sing by sight. That on November 18, 1923, he saw him coming from Salinas; the co-defendant was driving the automobile in which both defendants were riding; that "this defendant" got up and pulled down the curtains of the car, "in the rear of the car"; the defendants were then arrested "for speeding" by the witness and a traffic officer, Mr. Elasho; the latter took charge of the car and the witness took "that suitcase there with the opium in it." The "defendant" said he knew nothing of the opium, the contents of the valise or suitcase, that somebody put it in his car at Pajaro; "and we asked him where the key was, and he said he had no keys; we asked him who the overcoat belonged to,—Mr. Cording asked him who the overcoat belonged to, and he said it did not belong to him. I observed the search by the police officers of the defendant Wong Mat. I saw what the officers obtained from the defendant. They found two keys, a hypodermic needle, and some opium on a card or wrapped up in a paper, I think it was yen shee they called it. On the initial opening of the suitcase, it was opened by the police officers. *Traffic Officer Elasho had a key at that time, a skeleton key, or some key that would fit it. He opened it with that. Afterwards we found these two keys on the person of the defendant. That opened the suitcase.* Before the suitcase was opened at the jail the defendant told me that he was cutting fish in the cannery and he was going to see his cousin, Wong Chong, and

he had his rubber boots in this suitcase and knife and was going down to cut fish in the cannery. The defendant said he did not know what was in the suitcase, in answer to a question by Mr. Elasho. The suitcase was lying at the bottom of the car; in the rear in front of the back seat. It was not under the back seat. It was lying where the footboard was in back of the car. In front of the back seat. There was nothing over the suitcase; it was closed. He said, 'What have you got in the suitcase?' and he said, 'I can't say; I don't know.' This Chinaman here said that. This one did most of the talking at that time. Then Elasho said, 'I will find out,' and he said, 'You have not got any search warrant to find out.' This Chinaman here said that. I turned the suitcase over to Chief of Police Cording. He opened the suitcase. I think Elasho first opened it with his keys. The defendant denied that the opium belonged to him. He also denied that the suitcase belonged to him. At no time did I see the defendant Wong Lung Sing driving this car." (Trans. Rec. 9 to 18.)

The next witness for the Government was F. W. A. Cording. He testified, in part, that he was chief of police of the city of Monterey; that he knew the defendant Wong Lung Sing by sight; that he asked him what he had in the suitcase "and he told me he had clothes in there, and that he was going to work in a cannery. I asked him to open the suitcase and he told me he did not have the key. I asked him

if he was satisfied if I opened the suitcase and he told me to get a search warrant. *Officer Elasho tried one of his keys and found one of them to fit the suitcase.* I found two keys on the defendant, one fit the suitcase and one was smaller on a string. When I opened the suitcase I found the blanket was over the top, and there were 52 tins of opium wrapped up in newspaper and tied with string. I tried one of the keys on this suitcase and it opened it. It was one of the keys that I took off this defendant. It was on a string." (Trans. Rec. 18 to 22.)

The next witness for the Government was A. W. Roberts. He testified to being a Narcotic Officer and to having taken possession of the suitcase and contents. (Trans. Rec. 22.)

The next witness for the Government was Albert Elasho. He testified to the arrest, to seizing the suitcase containing the opium; that the Chinese denied he had a key, "*so I had a key that opened a suitcase about like his, with me, so I tried it, to see if it would open it,* but I never opened the case at all; they were searching for keys and could not find them, *so I told them I had a key that would open it and the district attorney told me to open the case,* and when we opened the case we found the cans of opium all wrapped up. I was present when the chief of police produced the keys. He said. 'Here is the key', he found the key. I don't know whether these keys were taken out of the overcoat, I couldn't say.

As a matter of fact the first I saw of the keys was they were in the hands of the chief of police; he immediately spoke about having the keys as soon as he had the keys; he said 'here are the keys now.' He had the short coat in his hand, just taking his hand out of that short coat pocket. I did not see him take any keys out of the pocket, but he had his hand in the pocket. This other Chinese who was arrested also was driving the car." (Trans. Rec. 23 to 29.)

For the defense, Wong Fat Shing testified that the automobile belonged to him; that the defendant Charley Wong You took the car without permission. (Trans. Rec. 30.)

Wong Lung Sing, the defendant, testified that he asked his co-defendant Charley Wong You where he was going with the automobile; this was at Watsonville. He replied that he was going to Monterey and the defendant said: "You go to Monterey, I will go with you to see my uncle in Monterey. I went with him about a little after one o'clock. Charley Wong was driving the automobile. I am not able to drive an automobile. This automobile did not belong to me. *I did not take any suitcase or any package with me when I went in the automobile with him at Watsonville.* The officer searched me. He looked in my coat pocket. He found some keys on my person at that time; that kind of key he found. He found the bunch of keys and he took one of the small keys away. He found

this bunch of keys in my pocket. He found a key in the coat pocket of the machine and that coat does not belong to me. It was a long overcoat. I had not put the overcoat in the automobile. *I didn't own it. It was in that overcoat the chief of police found two keys. Neither of these keys belonged to me. This suitcase and its contents did not belong to me. I did not put the suitcase in the automobile. I did not know that the suitcase was in the automobile or what its contents were when I went in the machine at Watsonville to ride to Monterey. I did not make a statement to the officers or anyone else that the suitcase contained rubber boots or that I was going to work in a cannery down at Monterey. I did not have any key on my ring or any place on my person that would open this suitcase.* When the chief of police found the two keys in the overcoat I did not have the overcoat on." (Trans. Rec. 32 to 37.)

It is respectfully submitted that there is no evidence tending to show that the dress suitcase and contents were ever *in the possession or control of the defendant Wong Lung Sing.* Therefore paragraph (f) of section 2 of the statute (Trans. Rec. 42, 43), making *possession* of a narcotic drug "sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury," has no application to the case, yet the verdict rests upon it. (Trans. Rec. 42, 43.)

True there is some evidence that a *key* was found in possession of the plaintiff in error that would

open the suitcase, but the arresting officer had a key of his own that would do the same thing, and no doubt there are many other persons having a key that would open the suitcase; this of itself proves nothing and at most it is but a constructive possession or an imputed possession, which is not the kind of possession the statute requires. The statute, we believe, demands evidence of an actual and conscious possession.

Underhill on Crim. Ev. (2nd Ed.) 527;
2 *Wharton's Criminal Ev.* (10th Ed.) sec. 758;
3 *Greenleaf on Ev.,* sec. 33;
18 *Am. & Eng. Ency. Law,* 487, 489, 490.

A constructive possession is not sufficient to hold a person responsible on a criminal charge.

Sorenson v. United States, 168 Fed. 785.

True, there is a statutory presumption of guilt under the act against the importation of smoking opium, from the possession of the drug.

Gee Woe v. United States, 250 Fed. 428;
Luria v. United States, 231 U. S. 9, 25;
U. S. v. Yu Fing, 222 Fed. 154;
Dean v. United States, 266 Fed. 694.

But to raise the presumption of guilt from the possession of the narcotic drug or the fruits or the instruments of crime, we respectfully contend they must have been found in the accused's exclusive possession. This is the distinction and point for

which we contend. Moreover, the evidence in this case showed and established possession in some one else.

There is no such evidence here as against the plaintiff in error. Granted, there is testimony that he misrepresented the contents of the dress suitcase, but he could do this and yet not have possession or control; no doubt he had been informed by Charley Wong You, the owner of the dress suitcase and contents, what was in it, and was attempting to shield him in misrepresenting its contents to the officers, if he did so; but this would not put *the actual possession* of the dress suitcase and contents on the plaintiff in error, nor would his requests that the officers get a search warrant as legal authority to open the dress suitcase have that effect. As to the negligible amount of opium and yen shee (see testimony of F. W. A. Cording, Transcript, pages 21, 22) found on the person of plaintiff in error it would not authorize a conviction under either count of the indictment.

In conclusion, as the evidence taken as a whole is entirely consistent with a reasonable hypothesis that the dress suitcase and contents were in the *exclusive possession* of the defendant Charley Wong You and belonged to him, and he alone was transporting it in the automobile he had taken from the owner (Trans. Rec. 30, 31), and the plaintiff was merely a passenger taking a ride from Watsonville to Monterey as shown by the uncontradicted testi-

mony in the case, the evidence will not sustain the conviction.

Isbell v. United States, 227 Fed. 788, 792.

As the entire evidence permits of a reasonable hypothesis consistent with the innocence of the plaintiff in error, it is insufficient in law to support the verdict that has been rendered against him.

> "Evidence of facts that are as consistent with innocence as with guilt is insufficient to sustain a conviction. Unless there is substantial evidence of facts which exclude every other hypothesis but that of guilt it is the duty of the trial judge to instruct the jury to return a verdict for the accused, and where all the substantial evidence is as consistent with innocence as with guilt it is the duty of the appellate court to reverse a judgment against him."

In the foregoing regard the authorities are uniform and manifold.

Isbell v. United States, 227 Fed. 788, 792 (8th Circuit), and the many cases therein cited.

VI.

ERRONEOUS RULING.

Not only did the District Court err in denying the motion for a directed verdict, but it erred to the prejudice of the legal rights of the plaintiff in error, when it overruled his objection to the offer made by the prosecution as evidence against him, of the dress suitcase and its opium contents. The evidence

does not show nor tend to show that the plaintiff in error owned or had possession of the dress suitcase or contents; on the contrary, the evidence is that they belonged to Charley Wong You; they were therefore inadmissible as evidence against the plaintiff in error. The prosecution's offer of the evidence, the objection of the plaintiff in error to it, the overruling of the objection and the exception reserved to the ruling, will be found at pages 29 and 30 of the transcript of record.

The undisputed facts from the evidence establish and prove that the automobile was owned by Wong Fat Shing and was being operated on the afternoon of November 18, 1923, at Monterey, at the time it was seized by the officers, by Charley Wong You, an employee of Wong Fat Shing. These facts established presumptively that the possession of every article and thing being transported and in the automobile were in the possession of Charley Wong You, the employee of Wong Fat Shing, the owner of the automobile. Things which a person possesses are presumed to be owned by him.

The suitcase and opium was in the possession of persons other than the defendant, and cannot without some satisfactory evidence from the person in whose possession it was found, or from some other satisfactory source, connecting the defendant with the suitcase and opium, be introduced in evidence against the defendant. It cannot be contended or inferred from the evidence that the presence of the

suitcase and opium in the automobile was attributable to the defendant. The defendant did not own the automobile. He did not hire it, nor did he get into it until it reached Watsonville. No evidence was introduced on the trial of the case connecting the defendant Wong Lung Sing in any way with the automobile, or the suitcase of opium. The automobile belonged to Wong Fat Shing and was operated by his employee Charley Wong You, and neither of these persons were on trial; therefore this evidence was not competent evidence against the defendant, and the ruling made by the Court admitting them as evidence against the defendant was an error of law highly prejudicial against the defendant and he is entitled to a reversal of judgment for this reason.

CONCLUSION.

It is respectfully submitted that for the foregoing reasons the judgment should be reversed.

Dated, San Francisco,
November 19, 1924.

M. H. HERNAN,
R. B. McMILLAN,
Attorneys for Plaintiff in Error.

No. 4363

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

WONG LUNG SING, alias WONG MAT,
Plaintiff in Error,

vs.

UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STERLING CARR,
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IN THE

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WONG LUNG SING, alias WONG MAT,
Plaintiff in Error,

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UNITED STATES OF AMERICA,
Defendant in Error.

BRIEF FOR DEFENDANT IN ERROR

STATEMENT

The plaintiff in error Wong Lung Sing was convicted in the United States District Court for the Northern District of California of violations of the laws relating to narcotic drugs.

On March 8, 1924, an indictment in two counts was presented against plaintiff in error and one Charlie Wong You.

The first count charged a violation of the Act of February 9, 1909, as amended, being the "Narcotic Drugs Import and Export Act". The charging part of the count was as follows:

> "The said defendants did then and there wilfully, unlawfully, knowingly, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain opium, to wit: fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and one bindle of yen shee containing 10 grains, which said prepared smoking opium and yen shee as the said defendants then and there well knew, had been imported into the United States contrary to law."

In the second count there was a charge of violating the Act of December 17, 1914, as amended, commonly known as the Harrison Anti-Narcotic Act. The charging part of the count was as follows:

> "The said defendant, did then and there knowingly, wilfully, unlawfully and feloniously purchase, sell, dispose and distribute a certain quantity of opium, to wit, fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and a certain derivative of opium, to wit, one bindle of yen shee containing 10 grains, which said smoking opium and yen shee was not then and there in nor from the original stamped packages."

The plaintiff in error alone was placed on trial and was convicted upon both counts of the indictment and being arraigned for sentence on February 9, 1924, was sentenced to

> "Be imprisoned for period of three (3) years in the United States Penitentiary at McNeill Island, Washington, as to each of the two counts

of the indictment. Said judgments of imprisonment to run concurrently and that he pay a fine of One Thousand ($1,000.00) Dollars." (Tr. p. 62.)

There was a motion for a directed verdict made and denied for each count.

At the trial the government presented the testimony of four witnesses. This testimony is set forth at pages 9 to 29 of the Transcript. It may be summarized as follows:

Witness Oyer was a Deputy Sheriff of Monterey County. Knew defendant by sight. On the afternoon of November 18, 1923, witness and Traffic Officer Elasho saw defendant and another driving along the road going southerly towards Monterey. The officers followed the defendants about 15 miles and when within a mile of the City limits of Monterey this defendant got up and pulled the curtains down in the rear of the car. The officers went past and turned their machine around and the defendants "lit out for Monterey." They were overtaken about a mile down the road, and as they were exceeding the speed limit they were arrested. Elasho took charge of the car, and witness took "that suit case there with the opium in it" and "he wanted to know if we had a search warrant for that suit case. I told him no, we had no search warrant. We arrested him for speeding. We went to Monterey and turned it over to the Chief of Police. He got a search warrant and found the opium in the case." (Witness

identified the suit case and "these cans and this blanket" as the contents. They were marked for identification.) Witness said, regarding questions asked of the defendant at the jail, there being present a State Deputy District Attorney, Justice of the Peace, Chief of Police Cording, and Traffic Officer Elasho, defendant said he knew nothing of the opium, the contents of the valise or suit case, that somebody put it in his car at Pajaro, and we asked him where the keys were and he said he had no keys. Mr. Cording asked him who the overcoat belonged to and he said it didn't belong to him. I observed the search by the Police Officers of the defendant Wong Mat. I saw what the officers obtained from the defendant. They found two keys, a hypodermic needle and some opium on a card or wrapped up in a paper; I think it was Yen Shee they called it. On the initial opening of the suit case, it was opened by the police officers. Traffic Officer Elasho had a key that time, a skeleton key, or some key that would fit it. He opened it with that. Afterwards we found these two keys on the person of the defendant. That opened the suit case. The place that I saw this car stop on this particular night of the arrest there was a big hedge with buildings on the inside of it, with a little opening that runs through a heavy cypress hedge. I think that the Chinese help from the Del Monte Hotel stop there or had their headquarters there. There were bunk houses or cottages there. Before the suit case was opened at the jail the defendant told me that he was cutting fish in the can-

nery and was going to see his cousin, Wong Chong, and that he had his rubber boots in this suit case and knife and that he was going to town to cut fish in the cannery.

On cross-examination witness said, among other things: "The defendant got up and pulled the curtain down. I went past him 100 yards, turned the machine around to go back and see who they were and what they were doing, and the driver lit out with his machine and I had to turn around and we overtook them about a mile down the road, near the City limits of Monterey and we stopped them. Elasho jumped off and went back and placed them under arrest. They were exceeding the speed limit. I left my car parked down the road and came back on foot. I know he was talking to this man when I got back there and said, 'What have you got in the suit case?' and he said, 'I don't know.' He addressed that to this defendant here. The suit case was lying in the bottom of the sedan in the rear in the back seat. There was nothing over the suit case. It was closed. He said, 'What have you got in the suit case?' and he said, 'I can't say, I don't know.' This Chinaman here said that. Then Elasho said, 'I will find out,' and he said, 'You have not a search warrant to find out.' This Chinaman here said that. So Elasho said, 'That will be all right. I will arrest you for speeding and I will take you to town where we will get a search warrant.' I took the suit case out of his car, and put it in mine, and Elasho took charge of the sedan and I went into town and turned

it over to Chief of Police Cording and he immediately got a search warrant and searched the suit case. They opened the suit case and found the contents as it stands there now. I saw the Chief of Police Cording find the key on the defendant Wong Lung Sing. He found the key in his coat pocket. He found two keys on a string." (Tr. pp. 9-16.)

Witness CORDING, Chief of Police of the City of Monterey, testified that he knew defendant Wong Lung Sing by sight. Saw him on November 18, 1923. "The man was brought in with a charge of reckless driving, and under suspicion of carrying contraband drugs, opium and stuff like that, he was brought before me and I asked him what he had in the suit case, and he told me he had had clothes in there, and that he was going to work in a cannery. He said he was going to work in a cannery in Monterey, that he was going to stop at 809 Ocean Avenue, at a place called the Wong Chong Hotel, and I asked him to open the suit case, and he told me that he did not have the key. I asked him if he was satisfied if I opened the suit case, and he told me to get a search warrant, and I turned and immediately went in a car to the district attorney's office, and brought him to the office, and he made out an affidavit for a search warrant, and got the search warrant and took it over to the justice of the peace's house and swore to it and came back, and while I was searching his body for his keys, Officer Elasho tried some of his keys and found one of them to fit the suit case. I found two keys on the defendant;

one fit the suit case and one was smaller, on a string. I found these keys in his coat pocket, not an overcoat, an outside coat pocket like this. And I found a small can of opium, a hypodermic needle, and a small quantity of yen shee. When I opened the suit case I found the blanket was over the top, and there were 52 tins of opium wrapped up in newspaper and tied with string. These look to be the same ones that I observed at that time. On every one of these cans was marked 'F. W. A. Cording.' I have got my mark on every one of them. The marks are still on some of them. I had a conversation with the defendant. It was all in English. He seems to speak very good English. I could understand him readily." (Tr. pp. 18-22.)

It was stipulated by the attorney for the defendant that the contents of the cans were opium.

Witness resumes: "I tried one of the keys on this suitcase and it opened it. It was one of the keys that I took off this defendant. It was on a string. One of the keys was smaller than the other. One opened the suitcase; that is it."

After I finished examining the suitcase I locked it up. I had the district attorney telephone Mr. Smith, federal narcotic agent at San Francisco, and he sent Officer Roberts down the following day to take the property in his possession. The following day the narcotic officer came down and took the suitcase. "I found some yen shee in the pocket of the defendant, Wong Lung Sing. It was a very

small quantity and a very little bit of it. It was in small bindles. I found it in his coat pocket, in one of his coat pockets. I asked him what he was doing with it, and he told me he was eating it, he was an opium smoker, to keep his nerves quiet. It was a very small quantity of what they call yen shee, about a thimble full. There was also a small can of opium about the size of a spool. I found that in the coat pocket of the defendant Wong Lung Sing. He told me that he had it for his own use. This yen shee is the ashes of opium that has been smoked and taken out of the pipe, the remains of the pipe. He did not deny that the yen shee was his. He said it was his. I also found a hypodermic needle on him." (Tr. pp. 21, 22.)

Witness ROBERTS, a narcotic inspector of the Internal Revenue Service, testified: He recognized the suitcase and contents. Obtained the suitcase and contents and brought it "to our office, 244 Post Office Building." It has been in our office in the safe custody of the narcotic agent ever since. This is the bindle of yen shee and this is the hypodermic needle found on the defendant. It was stipulated to be yen shee and the artciles were put in evidence and marked Government's Exhibit 2. (Tr. p. 22.)

Witness ELASHO was on the 18th day of November, 1923, a traffic officer and police officers of the city of Monterey. Knew the defendant Wong Lung Sing, alias Wong Mat, who sits there. Was with Officer Oyer on the occasion referred to but that witness. We observed a car going along with two Chi-

nese in it, a closed car. When they saw me they acted kind of suspicious. After we observed them they kind of stopped, hesitated and looked around. They acted as if they wanted to turn the car around and go back. We followed them 12 or 14 miles south. We got to about one mile outside of Monterey. They came to a hedge. Inside of this hedge is a Chinese vegetable garden, and some Chinamen are living there all the time. There are Chinese quarter for men to live in there. The car stopped there, and this defendant, Wong Lung Sing, was sitting up in the front seat with the driver, and immediately after the car stopped he climbed over the seat and got in back of the car and pulled the two side curtains and the rear down, and we speeded up to see what they were going to do and while we were doing that he turned around and saw us and started out again and speeded up to about 40 or 50 miles an hour and then I arrested them on a charge of speeding. I searched the person of this man here and found a little quantity of opium and some yen shee in his vest pocket; then I asked him what he had in his suitcase and he said he had a knife and some boots and some clothes that he was going to work in the cannery. So I told him I would like to look in the suitcase and he said, "No, you no lookee, you no catchem search warrant." This Chinaman said that and I said, "All right, we go to town and I catchem search warrant." He said, "No, you no catchem." Thereupon the defendant was arrested and the suitcase taken out of the car by Oyer and taken into

town. Chief of Police Cording was informed and he went to the district attorney's office and got a search warrant. While they were gone I asked this Chinese if he had a key and he said, "No," so I had a key that opened a suitcase like his and I tried it, but it never opened the case at all. I tried the lock to see if the key would work and in the meantime the Chief of Police came back and the District Attorney and the Chief of Police with a warrant and were searching for keys and could not find them, so I told them I had a key that would open it, and when we opened the case we found the cans of opium. They were wrapped up in twos, fours and sixes, in packages; they were then arrested and after the arrest was made and the Chief of Police searched the person of this Chinaman again and found a hypodermic needle and two keys to the suitcase that would open this suitcase. He found them in the pocket of the coat of this Chinese, an inside short coat. I asked him myself what he had in the suitcase and he said he had a knife and some boots in there, and said he was going to work in the cannery. I first asked him that when I stopped the car and arrested him; before we came to the Chief of Police's office. The Chief of Police asked him, before he opened the suitcase, what was in there and he said there were some clothes in there, and a knife and some rubber boots and some clothes, and that he was going to work in a cannery.

On cross-examination, witness said: He searched the defendant Wong Lung Sing at the time of the

arrest. Found a little can of opium. Didn't go through all of his pockets. Found a small can of yen shee in the vest pocket. I overlooked searching his front coat pocket because I was satisfied when I found that little can of opium and yen shee that I had a perfect right to arrest him.

Witness ROBERTS, recalled, said: That all the narcotics that were found were unstamped and in illegal condition. There was a stipulation as to the contents of the suitcase, whereupon it was offered in evidence and objected to as immaterial, irrelevant and incompetent, because it had not been connected up with the defendant Wong Lung Sing, and was seized as the result of an illegal, improper and unreasonable seizure of property at the time of the arrest. The objections were overruled and the offer received in evidence and marked. (Tr. pp. 29 and 30.)

On behalf of the defendant testimony was given tending to show that the car in question was owned by one Wong Fat Shing. The defendant testifying, denied certain of the testimony on the part of the government and said that he saw the other defendant, Charlie Wong You, in an automobile, saying he was going to Monterey, whereupon this defendant said that he would go with him to see his uncle, a little after one o'clock. That he, the defendant, didn't take any suitcase or package with him when he went in the automobile with him at Watsonville. The parties were stopped by the traffic officer. Defendant got out of the machine. The officers searched

defendant as he stood by the roadside. He found a small hop toy of opium, a small package of yen shee in defendant's pocket at that time and place, referring to United States Exhibit 2. Witness denied that he made any statement to anybody that the suitcase contained rubber boots, or that he was going to work in a cannery. Denied that he had a key on a ring or any place on his person that would open the suitcase. (Tr. pp. 32-37.)

Other testimony was given tending to show that the defendant was engaged in drying apples in Watsonville.

The court charged the jury orally in a charge set forth in the Transcript at pages 41 to 47.

The assignments of error, appearing at page 65 of the Transcript, are seven in number, but in the printed brief prepared in support of the writ of error but five of the assignments are argued, to-wit:

1) That the court erred in admitting in evidence the suitcase and contents,

2) That the court erred in denying the motion for a direct verdict of not guilty on the first count,

3) That the court erred in denying the motion for a directed verdict of not guilty on the second count,

4) That the court erred in denying the motion for arrest of judgment on the first count for insufficiency of that count, and

5) That the court erred in denying the motion for arrest of judgment on the second count for insufficiency of that count.

I

The First Count of the Indictment Properly Charges an Offense Under "The Narcotic Drugs Import and Export Act."

The first count of the indictment is based upon a provision of the Act entitled "An Act to Prohibit the Importation and Use of Opium for Other than Medicinal Purposes," approved February 9, 1909; (35 Stat. 614;) amended January 17, 1914; (38 Stat-275,) and amended May 26, 1922; (42 Stat. 596,) and being known as "The Narcotic Drugs Import and Export Act."

The provision involved is subdivision (c) of Section 2 of the Act as follows:

> "(c) That if any person fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or assists in so doing, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, such person shall upon conviction be fined not more than $5,000 and imprisoned for not more than ten years."

In the indictment it is charged that the defendants at a stated time and place violated a requirement of the Act in that

> "the said defendants did then and there wilfully, knowingly, feloniously and fraudulently receive, conceal, buy, sell and facilitate the transportation and concealment after importation of certain opium, to wit: fifty-five cans of prepared smoking opium containing 324 ounces, 15 grains, and one bindle of yen shee containing 10 grains, which said prepared smoking opium and yen shee as the said defendants then and there well knew, had been imported into the United States contrary to law."

That the crime denounced by the subdivision referred to is properly charged in the language used in the case at bar is supported by the authority of the decisions of this court.

Thus in the case of

Camou vs. U. S., 276 Fed. 120,

there were under review two indictments which had been consolidated. In the one Numbered 8420 it was charged that

> " P. J. Camou,
> hereinafter called the defendant, heretofore, to wit, on the 14th day of May, 1920, at San Francisco, in the Southern Division of the Northern District of California, then and there being, did then and there unlawfully, wilfully, and knowingly receive, conceal and facilitate the transportation and concealment after importation, of certain opium, to wit, ten tins of opium pre-

> pared for smoking purposes which as he, the said defendant, then and there well knew, had been imported into the United States contrary to law."

See record of this Court, *Camou vs. U. S.*, No. 3661.

On appeal the same contention was made that is made in the instant case to the effect that the plaintiff did not set forth facts showing importation or that it was contrary to law.

In passing upon the contention the court said that there were two indictments against plaintiff in error and that

> "one alleged that at a certain time and place within the jurisdiction of the trial court the defendant thereto unlawfully, wilfully and knowingly received, concealed and facilitated the transportation and concealment and after importation of certain specified opium prepared for smoking purposes, which he then and there well knew had been imported into the United States contrary to law."

And the court further said:

> "There is no doubt we think that the indictments were sufficient."

In the case of

> *Ukichi vs. U. S.*, 281 Fed. 525,

there was under review a conviction upon an indictment for conspiracy to commit an offense against the United States. The sufficiency of the indictment was questioned and the court said:

"The allegations of the indictment set forth a general combination unlawfully and feloniously to receive, conceal, buy and sell, and facilitate the transportation, concealment, and sale of certain opium and the preparations and derivatives thereof after importation, defendants knowing the same to have been imported contrary to law in violation of the Act of February 9, 1909, as amended by the Act of January 17, 1914. We believe the indictment sufficiently stated a conspirary to violate the statute cited."

And in the case of

Lee Choy vs. U. S., 283 Fed. 582,

there was an indictment in two counts; there was a conviction on the first and an acquittal on the second. The first count charged an offense under the provisions of the Act referred to. While the general sufficiency of the indictment was not discussed, it was, nevertheless, urged to be insufficient and its sufficiency sustained.

In considering the sufficiency of the indictment here it may be useful to note certain canons of construction in regard to indictments which have come to be well established:

(a) The rules governing criminal pleadings, while no less protective to an accused, have come to be less technical and more practical and decisions rejecting technical objections to an indictment are not now the exception. And this is eminently so from a consideration of the provisions of Section 1025 of the Revised Statutes.

Jelke v. U. S., 255 Fed. 264, 274.

This authority, on page 274, tersely states the doctrine and cites significant cases bearing upon the point, including a pertinent quotation from the case of

Harper v. U. S., 170 Fed. 385, 392.

(b) Defects of form in an indictment are not available on writ of error after verdict.

Section 1025, R. S.;

Connors v. U. S., 158 U. S. 408, 39 L. Ed. 1034;

New York Central Etc. Company v. U. S., 212 U. S. 481, 53 L. Ed. 613, 623;

Armour Packing Company v. U. S., 209 U. S., 56, 84, 52, L. Ed. 681, 695.

(c) In charging a crime created by statutory enactment it is usually sufficient to charge the crime in the words of the statute; this is especially true when the pleader is not coerced by any common law precedent in alleging any particular fact, as he might be in alleging the commission of a crime not established by statute.

Ledbetter v. U. S., 170 U. S. 606, 42 L. Ed. 1162, 1164;

U. S. vs. Gooding, 25 U. S. 460, 473, 6 L. Ed. 693, 697.

The charge here is substantially in the language of the statute quoted. It is said that the defendant did the acts wilfully, unlawfully, *knowingly,* feloniously and *fraudulently;* that he did receive, conceal, buy, sell and facilitate the transportation and concealment *after importation* of the drug. The phrase

"after importation" is equivalent of the phrase "after being imported" and is the statement of a fact. Next the pleader describes the drugs as certain opium, to wit, 55 cans of prepared smoking opium containing 324 ounces 15 grains and one bindle of yen shee containing 10 grains. Having so described the crime, the only remaining requirement of the statute was to charge the defendant with "knowing the same to have been imported contrary to law." Such scienter is clearly charged in and by the statement "which said prepared smoking opium and yen shee as the said defendants then and there well knew had been imported into the United States contrary to law."

It will be noted that this allegation really goes further than required. It might have been sufficient to say that the defendants then and there well knew that the narcotics had been imported into the United States contrary to law, but it went farther and made the direct charge that the drugs had been so imported as the defendants then and there well knew.

Manifestly the averment is sufficient in the absence of a demurrer or motion to strike out. If there were any defect it would be as to form merely.

It is further contended that the phrase "contrary to law" is a mere conclusion of law and not an averment of fact. It may be noted from the record of the Camou case that precisely the same contention was urged upon this court without effect in that case. The phrase is a statement of fact, or at least a mixed conclusion of law and fact and thus proper.

Under Section 1 of the Act referred to, the importation of prepared smoking opium into the United States is prohibited by law under any and all circumstances. Accordingly, when the pleader states that the drug in question is prepared smoking opium and that it has been imported, or is "after being imported," to use the statutory phrase, it is necessarily shown to be imported contrary to law.

This element of the case distinguishes it from the case of

Keck vs. U. S., 172 U. S. 434,

cited by plaintiff in error. In that case the Supreme Court did not rule that the phrase "contrary to law" was a mere conclusion to be disregarded. Its holding was placed upon the ground that the charge there under review did not sufficiently inform the defendant of the accusation against him, and this for the reason that the reference was to legal provisions not found in the section itself; that there was thus the necessity for reference to numerous statutory regulations concerning the importation of merchandise; that accordingly there was not sufficient information given to the defendant to apprise him of the charge

Thus in the Keck case it was said:

> "That the generic expression 'imported into the United States' did not convey the necessary information, because, importing merchandise is not *per se* contrary to law and could only be done in violation of specific statutory requirements."

Here the situation is wholly different. The absolute prohibiting of smoking opium is in the same act and applies to all conditions and all circumstances. As soon as the pleader alleged that the opium was prepared smoking opium and imported into the United States he necessarily charged an importation contrary to law.

In fact, the distinction here contended for is conceded in one of the cases cited by counsel on the subject, the case of

> *U. S. vs. Claflin,* (not Chapin) 25 Fed. Cas. No. 14798, 13 Blatchf. 178.

In that case appears the following language as a portion of the discussion:

> "When the language of a statute comprehends under general terms divers forms of illegality having different characteristics, it may well be considered proper to require something more than the words of the Act."

Here the use of the language of the statute would be sufficient for the reason that any possible importation of smoking opium was contrary to law and this by the very terms of the Act involved.

II

The Second Count of the Indictment Properly Charges an Offense Under the Harrison Anti-Narcotic Act.

The charge in the second count was the unlawful purchase, sale, disposition and distribution of smok-

ing opium not then and there in or from the original stamped package.

This charge is based upon the provisions of a clause in Section 1 of the Act of Congress of December 17, 1914, 38 Stat. 785, as amended February 24, 1919, 40 Stat. 1130. The provision of the section referred to is as follows

> "It shall be unlawul for any person to purchase, sell, dispense or distribute any of the aforesaid drugs, except in the original stamped package or from the original stamped package." (P. 1131.)

It will be noted here that the charge is in the language of the statute, that it sufficiently descends to particulars apprise the defendant of the precise charge he is called upon to meet, and to enable him to plead a conviction or acquittal in bar of any further prosecution for the same offense.

That the phraseology made use of in the charge is not insufficient has been held by this court in the cases of

Dean vs. U. S., 266 Fed. 694;
Dean vs. U. S., 266 Fed. 695.

The contention of plaintiff in error in regard to the second count seems to be that the word "defendant" in the singular is used instead of "defendants." We think that this is a mere defect of form not available upon writ of error after verdict under the provisions of Section 1025 of the Revised Statutes and cases cited above.

It is further contended that the plaintiff in error is not charged to be one of the persons required to register under the provisions of the Harrison Narcotic Act and certain cases are cited involving prosecutions not under Section 1 above referred to, but which were cases brought under Section 8 of the Statute prohibiting unlawful *possession* of narcotics by one not registered.

But counsel fail to appreciate the difference between the sections involved. It is provided in Section 8 that "it shall be unlawful for any person *not registered,* etc., to have possession, etc.," while in Section 1 it is provided that "it shall be unlawful for *any person* to purchase, sell, etc."

Accordingly there are decisions holding that in a prosecution under Section 8, it is necessary to allege and show that the defendant was of a class required to register. But such result does not follow in a prosecution under Section 1. It is needless to enlarge upon this distinction, however, for the Supreme Court of the United States has expressly set the matter at rest in the case of

> *United States vs. Wong Sing,* 260 U. S. 18, 21, 67 L. Ed. 105.

It is there held substantially that in a prosecution for the unlawful purchase of contraband drugs under Section 2 of the Act, which is of a similar character to the Section here involved, it is not necessary that the defendant be of a class who must register and pay special taxes.

III

The Evidence Is Sufficient to Justify the Conviction Upon Both Counts of the Indictment; the Court Did Not Err in Denying a Motion for a Directed Verdict.

The evidence was ample to justify the conviction of the defendant for the crime charged in the first count. It was ample to show his possession of the contraband narcotic drugs. Such having been shown, the jury were authorized to infer his guilt by virtue of the following provision of the same Act:

> "(f) Whenever on trial for a violation of subdivision (c) the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction, unless the defendant explains the possession to the satisfaction of the jury. (42 Stat. 597.)

The jury were further authorized to infer the guilt of the defendant for the crime charged in the second count from the proof of his possession of the drugs, coupled with the proof that the narcotics that were found were unstamped and in illegal condition. (Tr. p. 29.) Upon such a state of proof the guilt of the defendant could have been inferred by virtue of the provisions of the same section which denounced the crime charged, to wit,

> "It shall be unlawful for any person to purchase, sell, dispose, or distribute any of the aforesaid drugs except in the original stamped

> package or from the original stamped package; and the absence of appropriate tax-paid stamps from any of the aforesaid drugs shall be *prima facie* evidence of a violation of this section by the person in whose possession same may be found." (40 Stat. 1131.)

That these presumptions so created by statute are valid and effective can no longer be questioned.

> *Luria vs. U. S.,* 231 U. S. 9, 25, 58 L. Ed. 101;
> *Gee Woe vs. U. S.,* 250 Fed. 428;
> *Fiunkin vs. U. S.,* 265 Fed. 1, 3.

In the brief of plaintiff in error there is no serious, or indeed any contention in respect to the proofs other than to dispute the fact that possession was shown in the defendant. It thus results that this element alone need be considered.

Attention is called to the testimony of the witness Cording beginning at page 18 of the Transcript. Speaking of the defendant it was shown that the Chief of Police asked him what he had in the suitcase and he told the official he had clothes in there and was going to work in a cannery at Monterey. When asked to open the suitcase he responded also untruthfully that he didn't have the key. When asked if the official could open the case he told him to get a search warrant. He did not say in response to these questions that he did not own the suitcase or that he was not concerned in what was done. Thereupon the suitcase was opened and instead of clothes or rubber boots as the defendant had said to

another witness, there was found 52 tins of smoking opium. About the same time on searching the defendant, the same official, Chief Cording, found keys in his pocket which would open the suitcase.

And witness Elasho testified, among other things, beginning at page 23 of the Transscript, that he observed the car with the two Chinese in it acting suspicious; that they stopped and hesitated and looked around, acted like they wanted to turn around and finally when near Monterey, they stopped and this defendant climbed over the seat, got in back of the car and pulled the two side curtains and the rear down, and when the officers went up to see what they were going to do they turned around and started out again at great speed. After being arrested for speeding, witness asked defendant what he had in the suitcase and he said he had a knife and some boots and some clothes and that he was going to work in the cannery. The officer told him he would like to look in the suitcase and the defendant responded, "you no lookee, you no cathem search warrant." Thereupon the suitcase was taken to town and subsequently opened, and that on a second occasion the defendant told the Chief of Police, in response to the question and before the suitcase was opened, that he had clothes in there and a knife and some rubber boots and that he was going to work in a cannery. And it further appears, in fact it is not disputed, that upon searching the defendant at the time of his arrest there was found in his pockets a little can of opium and a small can of yen shee in the

vest pocket. (Tr. p. 27.) This the defendant does not dispute. (Tr. p. 34.) As to the quantity of this it was said that there was a thimble full of the yen shee and the small can of opium was about the size of a spool. (Tr. p. 21.) These latter articles were put in evidence as Exhibit No. 2, (Tr. p. 34 and Tr. p. 22) and the other opium as Exhibit No. 1, (Tr. p. 29) and were seen by the jury, but are not otherwise described or referred to in the bill of exceptions. Sufficient appears to show that as to the articles found on the person of the defendant the quantity was not negligible. Besides, in order to show error in the action of the court below it would have been incumbent upon the plaintiff in error to bring in the bill of exceptions a sufficient description of the exhibit if the point were material.

The testimony quoted is amply sufficient to show that the defendant was in possession of the suitcase and contents, as well as the opium found on his person. Neither is the case, as counsel seem to assume, a question of "constructive" possession. The possession of the suitcase by the defendant was actual. There was not wanting the element of propinquity. It is not a case where the possession is sought to be shown by or through an agent or a person for whose conduct he was responsible, he being in fact himself elsewhere. He was actually present and in apparent control of the suitcase, if the testimony of the government is to be believed. It was shown that he made false statements to the officers respecting the contents of the suitcase in endeavoring to prevent an

examination. He thus showed guilty knowledge or connection. He made false statements in respect to the fact that he had the keys. He was then shown to have actual possession in his pocket of the keys. The latter circumstance, to-wit, possession of the key to open a receptacle containing contraband drugs was deemed a sufficient element to sustain the conviction in the case of

Camou vs. U. S., 276 Fed. 120.

There was no showing in that case that the defendant had any drugs on his person, or dealt in, or had been seen with any drugs, or, indeed, had possession thereof, except the showing in regard to certain trunks. These trunks were in the basement of the hotel where he worked and the circumstances that he denied having keys for certain trunks; that upon the officers threatening a search he produced keys which were fit to open a certain trunk, which, on being opened, disclosed contraband drugs was deemed sufficient evidence to be submitted to the jury to show actual possession.

There was the precise situation here.

Other cases recognizing the probative value of the possession of keys for a trunk, suitcase, or other receptacle containing drugs are the cases of

Bram vs. U. S., 282 Fed. 271;
Pierriero vs. U. S., 271 Fed. 912.

Thus the evidence as to actual possession tended to show possession and ownership in the defendant.

The sufficiency and weight of such evidence was a question for the jury. That such actual possession could be shown by circumstances and circumstances similar to those appearing in the case at bar, is shown in the case of

Pierriero vs. U. S., supra.

Indeed, it may be said that there was an express admission of ownership, for when the defendant manifested such interest in the suitcase as to insist that it be not opened until a search warrant was produced, and, instead of denying ownership, expressly stated to the officers that it was being used for his rubber boots, clothes and knife, he admitted ownership, and that while it later appeared that he untruthfully stated the contents, it was open to the jury to find from his own statement the truth of his claim of ownership.

James vs. U. S., 279 Fed. 11, 112.

No Error in Admitting Evidence.

We need not discuss separately the separate assignment of error to the effect that there was error in receiving in evidence the suitcase and its contents. That the offer was material and relevant could not, of course, be controverted. It was urged that no connection with the defendant was shown, but from what we have said it may be seen that such connection was amply shown. The equivocal conduct of the defendant showing guilty knowledge and connection with endeavors to mislead the officers when

they offered to search the suitcase; his false statement that he had his clothes, rubber boots and knife therein and to be used to work in a cannery; his false statement respecting having any keys; his actual possession of keys to open the suitcase, coupled with the fact that the suitcase and drugs were transported with him, would be be sufficient to show the connection.

It may be noted further that the sentence of the defendant was for three years as to each of the counts, the terms of imprisonment to run concurrently. So far it would result that if the sentence of imprisonment be upheld as to either count it would be sufficiently supported under the doctrine of the case in re

Claasen vs. U. S., 142 U. S. 140.

However, to the language relating to such imprisonment, there is added the requirement "and that he pay a fine in the sum of $1,000." The sentence will be construed, we submit, in the defendant's favor, and so construed would not impose two fines of $1,000 each, while if the conviction be sustained on either of the counts it would support such fine in addition to the imprisonment. Moreover, it is not provided that the defendant suffer imprisonment until the fine be paid. It may well be that the fine could not be made on execution, so that the substantial part of the sentence is the imprisonment. But, as we have seen, if either count with the proofs thereon are sufficient to sustain the three years' im-

prisonment, it would be immaterial that the other would not.

CONCLUSION

In conclusion we submit that the defendant was properly charged with the crime under each count of the indictment, and he was shown to have been in possession of the contraband drugs in large quantities; that it is not to be doubted that he was a dangerous distributor of drugs and that no injustice is done in requiring him to suffer the imprisonment imposed.

The sentence should be affirmed.

Respectfully submitted,

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